1994

Newspaper Agency Corp. v. The Auditing Division of the Utah State Tax Commission : Amicus Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

NEWSPAPER AGENCY CORP., Petitioner/Appellant, vs. THE AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	94-0694-CA Supreme Court No. 940170 Priority No II

BRIEF OF AMICI CURIAE THE UTAH TAXPAYERS ASSOCIATION AND THE UTAH MANUFACTURERS ASSOCIATION

Appeal from a Decision and Order of the
The Utah State Tax Commission, W. Val Oveson, Chairman

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The Utah Manufacturers Ass'n

IN THE SUPREME COURT OF THE STATE OF UTAH

NEWSPAPER AGENCY CORP.,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	Supreme Court No. 940170
	)	
THE AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,	)	Priority No. 14
	)	
Respondent.	)	
	)	

BRIEF OF AMICI CURIAE THE UTAH TAXPAYERS ASSOCIATION AND THE UTAH MANUFACTURERS ASSOCIATION

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BRIEF OF AMICI CURIAE

Amici Curiae, The Utah Taxpayers Association and The Utah Manufacturers Association, appearing through their attorneys Kent W. Winterholler and Maxwell A. Miller of and for Parsons Behle & Latimer, respectfully submit their Brief in support of Newspaper Agency Corporation ("NAC"), that the decision of The Utah State Tax Commission (the "Commission"), wherein the Commission denied NAC a sales and use tax exemption under the provisions of Utah Code Ann. § 59-12-104(15) (Supp. 1994), should be reversed. The Utah Taxpayers Association is a statewide association of businesses and other taxpayers in Utah with approximately 2,000 members. The Utah Manufacturers Association is a statewide association of manufacturers and related businesses employing more than 84,000 employees out of approximately 115,000 workers employed in manufacturing industries in Utah.

STATEMENT OF COURT'S JURISDICTION

The Utah Supreme Court has jurisdiction over this Petition for Review of a final decision of the Commission under Utah Code Ann. § 63-46b-16 (1993) and Utah Code Ann. § 78-2-2(3)(e)(ii) (Supp. 1994).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

The only issue presented for review which this brief will address is: Did the Commission err when it concluded that NAC's purchase of machinery and equipment for use in NAC's Regent Street

printing facility, a manufacturing operation, did not qualify for exemption from sales and use tax under Utah Code Ann. § 59-12-104(15) (Supp. 1994)?

The language in Utah Code Ann. § 59-12-104(15), upon whose meaning a resolution of the above-stated issue turns is: What constitutes a "new or expanding operation" and what is a "normal operating replacement"? Amici Curiae submit that the Commission has not been granted discretion to define the term "normal operating replacement" and has abused its discretion in defining "new or expanding operations." Because the Commission does not have the discretion to define "normal operating replacements," the standard of review of the Commission's decision respecting this issue is correction of error under Utah Code Ann. § 59-1-610(1)(b) (Supp. 1994).

Because Utah Code Ann. § 59-12-104(15) directs the Commission to define by rule "new or expanding operations," the standard of review is the reasonableness of the Commission's interpretation and application of those terms. The Commission's interpretation and application of law will be reversed if the court determines the Commission's action is unreasonable, constituting an abuse of discretion. Utah Code Ann. § 63-46b-16(4)(h)(ii) (1993), Zissi v. State Tax Comm'n of Utah, 842 P.2d 848 (Utah 1992) and Albertsons,

Inc. v. Department of Employment Security, 854 P.2d 570 (Utah App. 1993).[1]

The Commission's interpretation of Rule R865-19-85S to require satisfaction of a "new products" test for exemption eligibility, when no such test is contemplated under the statute or required by the rule, raises an issue of law which should be reviewed for correctness. No deference should be granted the Commission by the court. Utah Code Ann. § 59-1-610(b) (Supp. 1994).

DETERMINATIVE STATUTES AND REGULATIONS

1. Utah Code Ann. § 59-1-610 (Supp. 1994). This statute is reproduced in full in Addendum I.

2. Utah Code Ann. § 59-12-104(15) (Supp. 1994). This statute is reproduced in full in Addendum I.

3. Rule 865-19-85S of the Utah Administrative Code. This rule is reproduced in full in Addendum I.

STATEMENT OF THE CASE

Amici Curiae believes the statement of the case contained in NAC's Brief adequately states the nature of the case, the course of proceedings and disposition of this case before the Commission. Amici Curiae also believes the Statement of Facts contained in NAC'S Brief is appropriate. Amici Curiae will not restate these matters in this brief, relying upon NAC's Statement of the Case.

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[1]All cases cited in this brief are reproduced, for the convenience of the court, in Addendum II.

SUMMARY OF ARGUMENTS

The Commission erred in its NAC decision and in Eaton-Kenway Inc. v. The Auditing Division of the Utah State Tax Commission, Utah Supreme Court Case No. 940126, by applying its definition of a "normal operating replacement," as contained in Rule 865-19-85S, to include all machinery and equipment which replaces existing machinery and equipment if the replacements produce one of the same products as the existing machinery. These holdings graft a test onto the Commission's rule which is not justified by the statute. This "new product" requirement is an incorrect and unreasonable action requiring reversal.

The effect of the Commission's NAC decision is to favor new, i.e., not currently existing, manufacturing operations over now existing, but expanding, manufacturing operations. The policy this action advances is devastating to Amici Curiae's membership and is contrary to the legislature's intent in explicitly including "expanding [manufacturing] operations" in the exemption language. The Commission's exclusion of the entire set of expanding manufacturing operations to whom the statutory exemption is available should be reversed as a violation of legislative intent and an usurpation of legislative authority.

The Commission has not been given discretion under Utah Code Ann. § 59-12-104(15), supra, the exemption statute, to define the term "normal operating replacements," but may only determine an

"increase [in] plant production or capacity." Therefore, Commission Rule R865-19-85S, which defines a "normal operating replacement" to include any "machinery or equipment which replaces existing machinery and equipment of a similar nature . . ." is beyond the Commission's authority and is erroneous.

ARGUMENT

I. THE COMMISSION'S ADOPTION OF A NEW PRODUCT REQUIREMENT IS NOT JUSTIFIED UNDER THE STATUTE AND RULE 85S.

In this case, and in the Eaton-Kenway decision, supra, the Commission has interpreted its own rule and applied a new products test. In its NAC decision, the Commission held:

> NAC's new offset presses and auxiliary equipment were placed in a plant that had previously consisted of an offset press and two letter presses. While the new offset presses and supporting equipment offer superior quality and greater capacity than the old letter presses, the basic purpose and actual use of both types of presses is the same: they produce daily newspapers. The Commission therefore concludes that NAC's new machinery and equipment is similar in nature to its old equipment and fails to meet the third alternative test of Rule R85S.A.3. for "new or expanding operation."

Commission Decision ("Decision" hereafter), [emphasis added] p. 14.

The Commission has ruled that if new machinery and equipment produces any of the same products as replaced machinery and equipment, it is a "normal operating replacement" no matter what other products the new machinery produces and no matter what additional functions the replacement machinery performs. In this ruling the Commission has focused its attention on a single aspect

of a manufacturing operation, does the new machinery produce the same product as the old machinery and equipment? The Commission deliberately ignores any changes in the process, character or nature of the operation. The Commission also ignores any new product capability, and any increased capacity, productivity or cost savings which the new machinery generates.

No new product test is contained in Rule 85S, or in Utah Code Ann. § 59-12-104(15), supra. Requiring NAC and other manufacturers to produce an entirely different product line in order to qualify as a "new or expanding operation" rewrites the statutory exemption by adding a requirement which the legislature did not include in the statute. This is an usurpation of legislative authority and the Commission should be reversed.[2]

The absurdity of this new, or different, product test is easily seen if the test is applied to a field other than printing.

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[2] The Utah Supreme Court in Sanders Brine Shrimp v. Audit Division of the Utah State Tax Comm'n, 846 P.2d 1304 (Utah 1993) overturned an earlier version of Rule 85S promulgated by the Commission which imposed a requirement that a business produce a new product in order to qualify as a manufacturer for purposes of the Utah Code Ann. § 59-12-104(15), supra, exemption. In this case, the Commission has once again attempted to impose a new, or different, product requirement by interpreting Rule 85S to exclude those businesses which produce the same product with replacement machinery and equipment. Under this ruling the replacement machinery producing the same product is a "normal operating replacement" not qualifying for the "new or expanding [manufacturing] operation" exemption. The legislature never included, nor intended, this requirement as a part of the exemption.

Under this test if a telecommunications company replaces its copper electronic voice and data transmission land lines with an orbiting satellite electronic voice and data transmission system, the satellite, and the land-based receiving stations, would be "normal operating replacements" for the replaced copper wire transmission lines. The new system and the old both perform the same function, electronic voice and data transmission. Both systems produce the same end product, transmitted information. Even though the technology which the new equipment employs is radically different, has a capacity thousands of times greater than the replaced copper wire, and is hundreds of times cheaper to employ and operate, the Commission would view the new system as a "normal operating replacement." This cannot be what the legislature meant when it excluded from a "new or expanding [manufacturing] operation" "normal operating replacements." The Commission's decision is incorrect and unreasonable and should be overturned.

II. THE COMMISSION'S RULE AND DECISION DISCRIMINATES AGAINST EXISTING UTAH MANUFACTURING OPERATIONS. THIS IS CONTRARY TO THE LEGISLATURE'S INTENT IN ENACTING THE EXEMPTION.

Rule 85S enunciates three tests under which a manufacturing operation can qualify for the sales and use tax exemption of Utah Code Ann. § 59-12-104(15), supra. The Commission's decision states:

> The Commission has specific statutory authority to define the term "new or expanding operation." The Commission's

> definition is found in Rule R865-19-85S.A.3., which limits "new or expanding" operations to those which are:
>
> (1) substantially different in nature, character, or purpose from prior activities;
>
> (2) begun in a new physical plant location in Utah; or
>
> (3) increase production or capacity, subject to the Commission's definition of "normal operating replacements." If NAC satisfies any one of the foregoing conditions, it meets the requirement of a "new or expanding operation."

Decision, pp. 10-11.

The first two criteria, i.e. (1) "substantially different in nature, character or purpose from prior activities" and, (2) "begun in a new physical plant location in Utah," are the Commission's attempt to define a "new" manufacturing operation. The third criteria, (3) "increase production or capacity," is an effort to define what the statute means by an "expanding" manufacturing operation.

In this case the Commission initially determined that NAC did not meet the first test for a "new" operation. The Commission held:

> Rule R85S.A.3.'s first criterion is that the machinery and equipment be used in activities that are substantially different in nature, character, or purpose from prior activities. NAC points to the improvement in newspaper quality that results from its new equipment. NAC also points to the equipment's ability to produce special advertising formats such as "gatefold" and "spadia." NAC further points to its ability, resulting from the new machinery and equipment, to compete for "preprint" and "contract" printing jobs.

> In the Commission's view, the foregoing activities are not substantially different from NAC's prior activities. Rather, they represent the incremental movement of the newspaper industry into an era where newspapers are of higher quality. The Commission finds NAC's activities along these lines to be evolutionary in nature and not substantially different from prior activities.

Decision, p. 11.

Even though NAC's new offset printing facility gave it the ability to manufacture products it was unable to produce with its old letter press machinery, the Commission held that the new operation was not substantially different from NAC's old facilities, i.e. was not a "new" manufacturing operation.[3]

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[3] Amici Curiae do not agree with the Commission's conclusion on this point. NAC's new Regent Street facility is "substantially" different from its old plant. The new facility enables NAC to deliver products which could not be produced in the old plant, i.e. spadia and gatefolds. Furthermore, the new plant placed NAC in a new line of business it was unable to enter with the old manufacturing plant, i.e. contract printing.

The Commission also ruled that NAC was not a "new" operation because its new printing facility was located in the same building shell its old letter press printing plant occupied.[4] The Commission then determined NAC did not qualify as an "expanding" operation because the end product of both the old and new facilities were the same, i.e. daily newspapers, even though the new offset printing facility differed from the old letter press printing plant in the following ways:

(1) The new plant employed new, modernized technology. Decision, p. 4.

(2) The new plant produced newspapers of much higher quality than were produced in the old facility. Decision, p. 14.

(3) The new plant was at least 20%, and at times 66%, more productive than was the old plant. Decision, p. 4.

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[4] This holding is an excellent example of how the Commission has unreasonably limited the exemption for a "new [manufacturing] operation." NAC's Regent Street printing plant was completely redone, the only resemblance between the old and new plant was that a portion of the new plant was in the same building shell as was the old plant. To hold, as the Commission did, that this was not a "new [manufacturing] operation" because it utilized the same building shell as the old plant for a portion of the new activities is an unreasonably narrow and restrictive definition of what a "new [manufacturing] operation" is under the statute. Amici Curiae agree with NAC that the Commission's requirement that a new plant must be in a new physical location in order to qualify as a "new [manufacturing] operation" is contrary to the plain meaning of the statute. This requirement subverts the legislature's intent when it stated in the statute that "new [manufacturing] operations" qualify for a sales tax exemption.

(4) The new plant enabled NAC to produce products that could not be produced in NAC's old letter press printing facility, spadia, gatefolds, and printed color inserts. Decision, pp. 3-4.

(5) The new plant enabled NAC to enter a new line of business it was unable to compete in with its old facilities, contract printing. Decision, p. 4.

Despite these findings of fact, the Commission held that NAC was not eligible for an exemption for machinery and equipment to be used in an "expanding" manufacturing operation because the new machinery produced one product which the replaced machinery also produced, daily newspapers.

The effect of the Commission's interpretation of Rule 85S in its NAC decision is that a manufacturer replacing its existing facilities with new machinery and equipment will never qualify for the exemption if the new equipment performs a single function, out of a multitude of functions, which the old equipment also performed. The exemption has been eliminated for any existing Utah manufacturer seeking to upgrade or modernize (expand) its manufacturing operations.

This is not what the Utah Legislature intended in enacting the exemption. The exemption is to be available to both new and <u>expanding</u> manufacturing operations, not just new manufacturing operations. In the 1985 Utah Senate debate respecting H.B. 103, the originally enacted exemption which is now codified at Utah Code

Ann. § 59-12-104(15) (Supp. 1994), Senator Sandberg expressed his concern that the exemption was not fair to existing Utah businesses. Dave Adams', from the Governor's office, response was that the exemption in the bill was good for those businesses that wanted to expand.[5]

The Commission's use of Rule 85S to deny the sales and use tax exemption of Utah Code Ann. § 59-12-104(15), supra to NAC is also bad public policy. One purpose of the exemption is to encourage investment in manufacturing operations by businesses considering new operations in Utah. An equal, and concurrent, purpose is to encourage investment by existing Utah businesses, such as NAC, that are considering expanding their manufacturing operations in Utah. The effect of Rule 85S, and the Commission's interpretation of the rule in its NAC decision, is to deny the exemption to existing Utah manufacturers. The Commission has eliminated the "expanding" operations language from the statute in its NAC and Eaton-Kenway, supra, decisions. This is improper and an abuse of the discretion granted the Commission in the statute.

Amici Curiae's membership is composed almost entirely of existing Utah manufacturers and businesses. The Commission's message to Amici's membership is ominous: If you modernize and

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[5] A copy of relevant portions from a transcript of the Utah Senate debate respecting H. B. 103, February 26, 1985, is reproduced in the Appendix.

upgrade your manufacturing plants to compete in the new global economy, don't expect any help in Utah. Even though the Utah Legislature has enacted a statute to encourage investment by Utah companies in "expanding" operations by granting a sales and use tax exemption, in Rule 85S and in the NAC and Eaton-Kenway decisions the Commission has eliminated the exemption for an "expanding" manufacturing operation.

The court should not allow the Commission to rewrite and restrict this exemption in this fashion. The policy decision about the availability of the exemption for an "expanding" manufacturing operation is the Legislature's alone. The Legislature has already made that policy decision in favor of extending the exemption to a manufacturer such as NAC in this case. The Commission's decision is incorrect, improper, and unreasonable and it should be reversed.

III. THE COMMISSION'S RULE AND ITS DECISION IN THIS CASE VIOLATE CANONS OF STATUTORY CONSTRUCTION.

The sales and use tax exemption denied by the Commission to NAC states in pertinent part:

> (15) sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements, which includes replacement machinery and equipment even though they may increase plant production or capacity, as determined by the Commission) in any manufacturing facility in Utah.

(a) manufacturing facility means an establishment described in SIC Codes 2000 to 3999 of the 1987 Standard Industrial Classification Manual, of the federal Executive Office of the President, Office of Management and Budget.

(b) for purposes of this subsection, the commission shall by rule define "new or expanding operations" and "establishment."

Utah Code Ann. § 59-12-104(15) (Supp. 1994).

The Commission has attempted to implement this rule by promulgating Rule 865-19-85S ("Rule 85S"). That rule defines "new or expanding operations" as follows:

3. "New or expanding operations" means manufacturing, processing, or assembling activities which:

(a) are substantially different in nature, character, or purpose from prior activities;

(b) are begun in a new physical plant location in Utah; or

(c) increase production or capacity. This definition is subject to limitations dealing with normal operating replacements.

The Commission then defines "normal operating replacements" in Rule 85S, stating:

6. "Normal operating replacements" means machinery or equipment which replaces existing machinery or equipment of a similar nature, even if the use results in increased plant production or capacity.

Apparently, the Commission has interpreted the statutory language "excluding normal operating replacements, which includes replacement machinery and equipment even though they may increase plant production or capacity, as determined by the commission," as

granting the Commission the authority to define "normal operating replacements." However, the actual authority granted the Commission in the statute is the more limited power to determine the circumstances under which more productive machinery and equipment is, or is not, a "normal operating replacement." This is not the broad authority to define a "normal operating replacement" as machinery and equipment of a "similar nature," as the Commission is attempting in Rule 85S. Grammatically, the statutory language "as determined by the commission" modifies "increased plant production or capacity," not "normal operating replacement."

In Wells Fargo Armored Service Corporation Public Service Commission of Utah, 626 P.2d 450 (Utah 1981) the Utah Supreme Court approved this "last antecedent" rule of statutory construction.[6] In sustaining the interpretation by the Public Service Commission

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[6] See 2A Sutherland Statutory Construction § 47.33 (4th ed. rev. 1984) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.") See, also Webster's Legal Secretaries Handbook 258 (1981) ("In order to achieve maximum clarity and to avoid the possibility that the reader will misinterpret what he reads, one should place a modifying clause as close as possible to the word or words it modifies.") See, also Jensen v. City and County of Denver, 806 P.2d 381, 385 (Colo. 1991); Taylor v. Perdition Minerals Group, Ltd., 244 Kan. 126; 766 P.2d 805, 810 (1988); Harris Trust & Savings Bank v. Mack, 49 Ill. App.3d 349; 364 N.E.2d 349, 354 (1977). Since the Legislature uses words "advisedly," Savage Industries, Inc. v. Utah State Tax Commission, 811 P.2d 664, 670 (Utah 1991), it must also be assumed, given a possibility of different constructions, that the grammatically correct usage was intended.

of a statutory exemption from regulation of an armored car company, the court stated:

> The words of the statutory provision and the statutory policy embodied therein assist in ascertaining that meaning. Resort to principles of statutory construction provide some guidance in the endeavor. In reaching its conclusion, the Commission relied on the "last antecedent" rule of statutory construction. The rule provides in general terms that when there is a modifier following a series of nouns, the modifier will apply only to the immediately prior antecedent, which in this case has the effect of excluding armored vehicles from regulation.

Id., at p. 451

As an example of how the last antecedent rule of statutory construction operates, Amici suggests an examination of the following sentence: "Indonesia, Venezuela, Mexico and Canada, which also has gas reserves, are countries with significant oil production." The modifying phrase "which also has gas reserves" applies only to the noun "Canada" in this sentence, not to all the other nouns which precede the phases, i.e., Indonesia, Venezuela, and Mexico. Similarly, the statutory language "as determined by the Commission" does not modify "normal operating replacements" as the Commission seems to believe.

In this case the Commission has adopted a rule defining the statutory term "normal operating replacement" to mean replacement machinery and equipment which is "of a similar nature." This is an effort by the Commission to exercise authority which the statute does not grant. A proper reading of the statute permits the

Commission to determine what an "increase [in] plant production and capacity," is, but not to define "a normal operating replacement" as any machinery and equipment "of a similar nature," as the Commission has attempted in Rule 85S.

CONCLUSION

The Commission has improperly construed Rule 85S to require replacement machinery and equipment to produce a new, or different, product in order to qualify for the sales and use tax exemption of Utah Code Ann. § 59-12-104(15), supra. The Commission's action in applying rule 85S in this case, and in Eaton-Kenway, supra, has effectively rewritten the statute to eliminate the exemption for an "expanding operation." Contrary to legislative intent, this discriminates against existing Utah manufacturers. The Commission has also incorrectly read the language of Utah Code Ann. § 59-12-104(15), supra, in promulgating Rule 85S. The statute does not grant the Commission the authority to define "normal operating replacement" as any machinery and equipment which is "of a similar nature" to existing machinery and equipment. The Commission's actions are incorrect, are unreasonable, and are an usurpation of legislative authority. The Commission should be reversed.

Respectfully submitted this 27th day of October, 1994.

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Attorneys for Amici Curiae
The Utah Taxpayers Ass'n
The Utah Manufacturers Ass'n

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 1994, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing BRIEF OF AMICI CURIAE THE UTAH TAXPAYERS ASSOCIATION AND THE UTAH MANUFACTURERS ASSOCIATION, to:

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Assistant Utah Attorney General
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Addenda

Addendum 1

History: C. 1953, 59-1-502.5, enacted by L. 1993, ch. 248, § 1.
Effective Dates. — Laws 1993, ch. 248 became effective on May 3, 1993, pursuant to Utah Const., Art. VI, Sec. 25.

59-1-504. Time determination final.

NOTES TO DECISIONS

Judicial review.
A petitioner's time limit for filing for judicial review of a final tax commission order is prescribed by § 63-46b-14(3) and not this section, which governs petitions for redetermination of deficiencies before the commission and not petitions for judicial review. Dusty's, Inc. v. Auditing Div., 842 P.2d 868 (Utah 1992).

59-1-505. Deposit of amount due prerequisite to appeal.

NOTES TO DECISIONS

Constitutionality.
To the extent that this section precludes reasonable access to judicial review, it violates the open courts provision, Art. I, Sec. 11, of the Utah Constitution and is unconstitutional as applied; however, the statutory requirement is not unconstitutional in all cases. For example, when a taxpayer is able to meet the requirement, the deposit must be paid. Jensen v. State Tax Comm'n, 835 P.2d 965 (Utah 1992).

PART 6

JUDICIAL REVIEW

59-1-601. District court jurisdiction.

(1) In addition to the jurisdiction granted in Section 63-46b-15, beginning July 1, 1994, the district court shall have jurisdiction to review by trial de novo all decisions by the commission resulting from formal adjudicative proceedings.

(2) As used in this section, "trial de novo" means an original, independent proceeding, and does not mean a trial de novo on the record.

(3) In any appeal taken after July 1, 1994, from a formal hearing to the district court pursuant to this section, the commission shall certify a record of its proceedings to the district court which record shall be reviewed and considered by the district court. A district court may not, unless the parties otherwise agree in writing, hear witnesses that were not called to testify or consider exhibits that were not presented to the commission at the formal hearing. If the parties do not agree, and a district court determines that additional witnesses should be heard or additional exhibits considered in the interest of justice, the district court shall remand the case to the commission for that purpose. This subsection supercedes Section 63-46b-16 pertaining to judicial review of formal adjudicative proceedings.

History: C. 1953, 59-24-1, enacted by L. 1977, ch. 80, § 20; renumbered by L. 1987, ch. 3, § 36; 1987, ch. 161, § 215; 1992, ch. 127, § 2; 1993, ch. 248, § 2.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, rewrote the former provisions of this section as Subsection (1) and added Subsections (2) and (3).

59-1-602. Right to appeal — Venue — County as party in interest.

(1) (a) Any aggrieved party appearing before the commission or county whose tax revenues are affected by the decision may at that party's option petition for judicial review in the district court pursuant to this section, or in the Supreme Court or the Court of Appeals pursuant to Section 63-46b-16.

(b) Judicial review of formal or informal adjudicative proceedings in the district is in the district court located in the county of residence or principal place of business of the affected taxpayer or, in the case of a taxpayer whose taxes are assessed on a statewide basis, to the Third Judicial District Court in and for Salt Lake County.

(2) A county whose tax revenues are affected by the decision being reviewed shall be allowed to be a party in interest in the proceeding before the court.

History: C. 1953, 59-24-2, enacted by L. 1977, ch. 80, § 21; 1983, ch. 278, § 2; renumbered by L. 1987, ch. 3, § 37; 1987, ch. 161, § 216; 1992, ch. 127, § 3; 1993, ch. 248, § 3.
Amendment Notes. — The 1993 amendment, effective May 3, 1993, inserted "at that party's option" in Subsection (1)(a), added the language beginning "in the district court" at the end of that subsection, and inserted "formal or" and "in the district" in Subsection (1)(b).

59-1-610. Standard of review of appellate court.

(1) When reviewing formal adjudicative proceedings commenced before the commission, the Court of Appeals or Supreme Court shall:

(a) grant the commission deference concerning its written findings of fact, applying a substantial evidence standard on review; and

(b) grant the commission no deference concerning its conclusions of law, applying a correction of error standard, unless there is an explicit grant of discretion contained in a statute at issue before the appellate court.

(2) This section supercedes Section 63-46b-16 pertaining to judicial review of formal adjudicative proceedings.

History: C. 1953, 59-1-610, enacted by L. 1993, ch. 248, § 4.
Effective Dates. — Laws 1993, ch. 248 became effective on May 3, 1993, pursuant to Utah Const., Art. VI, Sec. 25.

NOTES TO DECISIONS

ANALYSIS

Applicability of section.
Cited.

Applicability of section.
This section applied to case begun before its enactment, because standard of review is procedural, not substantive. Board of Equalization v. Utah State Tax Comm'n ex rel. Benchmark, Inc., 226 Utah Adv. Rep. 11 (1993).

Cited in Miller Welding Supply, Inc. v. Utah State Tax Comm'n, 221 Utah Adv. Rep. 8 (Ct. App. 1993); OSI Indus., Inc. v. Utah State Tax Comm'n, 221 Utah Adv. Rep. 34 (Ct. App. 1993); Orton v. Utah State Tax Comm'n, 225 Utah Adv. Rep. 26 (Ct. App. 1993); Harper Invs., Inc. v. Auditing Div., 231 Utah Adv. Rep. 3 (Utah 1994); Matrix Funding Corp. v. Auditing Div., 231 Utah Adv. Rep. 23 (Utah Ct. App. 1994).

taxes. B.J.-Titan Servs. v. State Tax Comm'n, 842 P.2d 822 (Utah 1992).

Purchaser.

The focus of Subsection (1)(a) is on the purchaser, rather than the item purchased. Thorup Bros. Constr. v. Auditing Div. of Utah State Tax Comm'n, 221 Utah Adv. Rep. 39 (1993).

A contractor is not liable for sales taxes on property that it did not purchase or own. Thorup Bros. Constr. v. Auditing Div. of Utah State Tax Comm'n, 221 Utah Adv. Rep. 39 (1993).

Electrical contractor could not be assessed a use tax on materials purchased by owners that were tax-exempt entities. Arco Elec. v. Utah State Tax Comm'n, 222 Utah Adv. Rep. 11 (1993), following Thorup Brothers Constr., Inc. v. Auditing Division of the Utah State Tax Comm'n, 221 Utah Adv. Rep. 39 (1993).

Repairs and renovations.

The tax commission erred when it included the cost of milling and drilling raw logs incurred by a railroad in assessing a use tax on railroad ties brought instate for use. The basis for calculating the use tax in such a case is the amount paid for the raw logs when purchased plus the amount paid for services that fall into *one of the specified categories of taxable services* set forth in this section. The commission erroneously concluded that the milling and drilling procedures were "repairs or renovations" within the meaning of Subsection (1)(g). Union Pac. R.R. v. Auditing Div., 842 P.2d 876 (Utah 1992).

Sale of goods to subsidiary.

A seller was liable under Subsection (1)(a) for sales of goods to another corporation despite the fact that the Department of Transportation found the two corporations to be a single entity for the purposes of the Davis Bacon Act. One agency's determination is not necessarily binding on the deliberations of another agency, and federal labor law criteria are irrelevant to a determination of state taxability. Hales Sand & Gravel, Inc. v. Auditing Div., 842 P.2d 887 (Utah 1992).

Transfer of vehicles.

Transfer of vehicles subject to sales tax. See B.J.-Titan Servs. v. State Tax Comm'n, 842 P.2d 822 (Utah 1992).

Transportation costs as part of sales price.

Transportation charges are taxable under Subsection (1)(a) as part of the sales price of personal property if they are incurred before the transfer of title. When a sales contract requires delivery at destination, title passes at destination and the transportation costs are therefore subject to taxation unless the parties explicitly agree otherwise. Hales Sand & Gravel, Inc. v. Auditing Div., 842 P.2d 887 (Utah 1992).

—"Small-batch" charges.

"Small-batch" charges added by a concrete seller to concrete batches that were too small to absorb the costs of delivery were taxable under Subsection (1)(a) as a transportation charge added to the sales price. Hales Sand & Gravel, Inc. v. Auditing Div., 842 P.2d 887 (Utah 1992).

Water softeners.

The sale of water softeners, sold pursuant to sales and installation contracts, are sales of improvements to real estate, and not sales of tangible personal property subject to sales tax. Superior Soft Water Co. v. Utah State Tax Comm'n, 843 P.2d 525 (Utah Ct. App. 1992).

Cited in Matrix Funding Corp. v. Auditing Div., 231 Utah Adv. Rep. 23 (Utah Ct. App. 1994).

59-12-104. Exemptions.

The following sales and uses are exempt from the taxes imposed by this chapter:

(1) sales of aviation fuel, motor fuel, and special fuel subject to a Utah state excise tax under Title 59, Chapter 13, Motor and Special Fuel Tax Act;

(2) sales to the state, its institutions, and its political subdivisions, except sales of construction materials however, construction materials purchased by the state, its institutions, or its political subdivisions which are installed or converted to real property by employees of the state, its institutions, or its political subdivisions are exempt;

(3) sales of food, beverage, and dairy products from vending machines in which the proceeds of each sale do not exceed $1 if the vendor or operator of the vending machine reports an amount equal to 150% of the cost of items as goods consumed;

(4) sales of food, beverage, dairy products, similar confections, and related services to commercial airline carriers for in-flight consumption;

(5) sales of parts and equipment installed in aircraft operated by common carriers in interstate or foreign commerce;

(6) sales of commercials, motion picture films, prerecorded audio program tapes or records, and prerecorded video tapes by a producer, distributor, or studio to a motion picture exhibitor, distributor, or commercial television or radio broadcaster;

(7) sales made through coin-operated laundry machines that are:

(a) located in multiple dwelling units;

(b) used exclusively for the benefit of tenants; and

(c) not available for use by the general public;

(8) sales made to or by religious or charitable institutions in the conduct of their regular religious or charitable functions and activities, if the requirements of Section 59-12-104.1 are fulfilled;

(9) sales of vehicles of a type required to be registered under the motor vehicle laws of this state which are made to bona fide nonresidents of this state and are not afterwards registered or used in this state except as necessary to transport them to the borders of this state;

(10) sales of medicine;

(11) sales or use of property, materials, or services used in the construction of or incorporated in pollution control facilities allowed by Sections 19-2-123 through 19-2-127;

(12) sales or use of property which the state is prohibited from taxing under the Constitution or laws of the United States or under the laws of this state;

(13) sales of meals served by:

(a) public elementary and secondary schools;

(b) churches, charitable institutions, and institutions of higher education, if the meals are not available to the general public; and

(c) inpatient meals provided at medical or nursing facilities;

(14) isolated or occasional sales by persons not regularly engaged in business, except the sale of vehicles or vessels required to be titled or registered under the laws of this state;

(15) sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements, which includes replacement machinery and equipment even though they may increase plant production or capacity, as determined by the commission) in any manufacturing facility in Utah;

(a) manufacturing facility means an establishment described in SIC Codes 2000 to 3999 of the 1987 Standard Industrial Classification Manual, of the federal Executive Office of the President, Office of Management and Budget;

(b) for purposes of this subsection, the commission shall by rule define "new or expanding operations" and "establishment";

(c) by October 1, 1991, and every five years thereafter, the commission shall review this exemption and make recommendations to the Revenue and Taxation Interim Committee concerning whether the exemption should be continued, modified, or repealed. In its report to the Revenue and Taxation Interim Committee, the tax commission review shall include at least:

(i) the cost of the exemption;
(ii) the purpose and effectiveness of the exemption; and
(iii) the benefits of the exemption to the state;

(16) sales of tooling, special tooling, support equipment, and special test equipment used or consumed exclusively in the performance of any aerospace or electronics industry contract with the United States government or any subcontract under that contract, but only if, under the terms of that contract or subcontract, title to the tooling and equipment is vested in the United States government as evidenced by a government identification tag placed on the tooling and equipment or by listing on a government-approved property record if a tag is impractical;

(17) intrastate movements of freight by common carriers;

(18) sales of newspapers or newspaper subscriptions;

(19) tangible personal property, other than money, traded in as full or part payment of the purchase price, except that for purposes of calculating sales or use tax upon vehicles not sold by a vehicle dealer, trade-ins are limited to other vehicles only, and the tax is based upon the then existing fair market value of the vehicle being sold and the vehicle being traded in, as determined by the commission;

(20) sprays and insecticides used to control insects, diseases, and weeds for commercial production of fruits, vegetables, feeds, seeds, and animal products;

(21) sales of tangible personal property used or consumed primarily and directly in farming operations, including sales of irrigation equipment and supplies used for agricultural production purposes, whether or not they become part of real estate and whether or not installed by farmer, contractor, or subcontractor, but not sales of:

(a) machinery, equipment, materials, and supplies used in a manner that is incidental to farming, such as hand tools with a unit purchase price not in excess of $100, and maintenance and janitorial equipment and supplies;

(b) tangible personal property used in any activities other than farming, such as office equipment and supplies, equipment and supplies used in sales or distribution of farm products, in research, or in transportation; or

(c) any vehicle required to be registered by the laws of this state, without regard to the use to which the vehicle is put;

(22) seasonal sales of crops, seedling plants, or garden, farm, or other agricultural produce if sold by the producer;

(23) purchases of food made with food stamps;

(24) sales of nonreturnable containers, nonreturnable labels, nonreturnable bags, nonreturnable shipping cases, and nonreturnable casings to a manufacturer, processor, wholesaler, or retailer for use in packaging tangible personal property to be sold by that manufacturer, processor, wholesaler, or retailer;

(25) property stored in the state for resale;

(26) property brought into the state by a nonresident for his or her own personal use or enjoyment while within the state, except property purchased for use in Utah by a nonresident living and working in Utah at the time of purchase;

(27) property purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product;

(28) property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state shall be paid any difference between the tax paid and the tax imposed by this part and Part 2, and no adjustment is allowed if the tax paid was greater than the tax imposed by this part and Part 2;

(29) any sale of a service described in Subsections 59-12-103(1)(b), (c), and (d) to a person for use in compounding a service taxable under the subsections;

(30) purchases of food made under the WIC program of the United States Department of Agriculture;

(31) sales or leases made before June 30, 1996, of rolls, rollers, refractory brick, electric motors, and other replacement parts used in the furnaces, mills, and ovens of a steel mill described in SIC Code 3312 of the 1987 Standard Industrial Classification Manual, of the federal Executive Office of the President, Office of Management and Budget;

(32) sales of boats of a type required to be registered under Title 73, Chapter 18, State Boating Act, boat trailers, and outboard motors which are made to bona fide nonresidents of this state and are not thereafter registered or used in this state except as necessary to transport them to the borders of this state;

(33) sales of tangible personal property to persons within this state that is subsequently shipped outside the state and incorporated pursuant to contract into and becomes a part of real property located outside of this state, except to the extent that the other state or political entity imposes a sales, use, gross receipts, or other similar transaction excise tax on it against which the other state or political entity allows a credit for taxes imposed by this chapter;

(34) sales of aircraft manufactured in Utah if sold for delivery and use outside Utah where a sales or use tax is not imposed, even if the title is passed in Utah;

(35) until July 1, 1999, amounts paid for purchase of telephone service for purposes of providing telephone service; and

(36) fares charged to persons transported directly by a public transit district created under the authority of Title 17A, Chapter 2, Part 10.

History: L. 1933, ch. 63, § 6; 1933 (2nd S.S.), ch. 20, § 1; 1939, ch. 103, § 1; C. 1943, 80-15-6; 1945, ch. 110, § 1; 1957, ch. 126, § 1; 1957, ch. 127, § 1; 1965, ch. 128, § 1; 1967, ch. 162, § 1; 1969, ch. 187, § 3; 1969 (1st S.S.), ch. 14, § 3; 1973, ch. 42, § 9; 1973, ch. 154, § 1; 1975, ch. 179, § 2; 1976, ch. 28, § 1; 1979, ch. 195, § 1; 1981, ch. 238, § 1; 1981, ch. 239, § 2; 1982, ch. 70, § 1; 1983, ch. 264, § 1; 1983, ch. 281, § 1; 1983 (1st S.S.), ch. 6, § 2; 1984, ch. 59, § 1; 1984, ch. 60, § 1; 1985, ch. 80, § 3; 1986, ch. 9, § 1; 1986, ch. 55, § 6; 1986, ch. 99, § 1; 1986, ch. 134, § 1; 1986, ch. 168, § 1; C. 1953, 59-15-6; renumbered by L. 1987, ch. 5, § 26; 1987, ch. 51, § 1; 1987 (1st S.S.), ch. 10, §§ 1, 2; 1988, ch. 58, § 1; 1988, ch. 66, § 2; 1988, ch. 69, § 1; 1989, ch. 89, § 1; 1989, ch. 169, § 1; 1989, ch. 247, § 1; 1990, ch. 22, § 2; 1990, ch. 36, § 1; 1991, ch. 5, § 57; 1991, ch. 111, § 1; 1991, ch. 112, § 216; 1992, ch. 66, § 3; 1992, ch. 298, § 2; 1993, ch. 166, § 1; 1993, ch. 296, § 1; 1994, ch. 49, § 1; 1994, ch. 155, § 1; 1994, ch. 213, § 1; 1994, ch. 217, § 2; 1994, ch. 226, § 2; 1994, ch. 248, § 1.

Amendment Notes. — The 1993 amendment by ch. 166, effective May 3, 1993, substituted "sales of aviation fuel, motor fuel, and special fuel" for "sales of motor fuels and special fuels" in Subsection (1).

The 1993 amendment by ch. 296, effective May 3, 1993, substituted "1996" for "1994" in Subsection (31).

The 1994 amendment by ch. 49, effective May 2, 1994, rewrote Subsection (24), which for-

merly read: "any container, label, shipping case, or, in the case of meat or meat products, any casing."

The 1994 amendment by ch. 248, effective May 2, 1994, in Subsection (31), deleted "after July 1, 1987, and" after "leases made" and "but only if the steel mill was a nonproducing Utah facility purchased and reopened for the production of steel" at the end.

The 1994 amendment by ch. 155, effective July 1, 1994, substituted "150%" for "120%" in Subsection (3).

The 1994 amendment by ch. 213, effective July 1, 1994, redesignated the subsections under Subsection (15); substituted "by common carriers" for "and express or street railway fares" in Subsection (17); and added Subsection (36), making a related stylistic change.

The 1994 amendment by ch. 217, effective July 1, 1994, deleted "coin-operated dry cleaning machines, or coin-operated car washes" in the introductory language of Subsection (7); added Subsections (7)(a) through (7)(c); subdivided Subsection (15); and made related stylistic changes.

The 1994 amendment by ch. 226, effective July 1, 1994, inserted the language following the first occurrence of "political subdivisions" in Subsection (2) and deleted "and, after July 1, 1993" after "activities" in Subsection (8).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

NOTES TO DECISIONS

ANALYSIS

Charitable institution.

—Activities.

Church industry auxiliary, chartered as a non-profit corporation, which ran, among other things, a transient shelter, a vocational education program, a retirement center, and a day care center, charging nominal fees to defray costs, lost its sales-tax-exempt status by severing from its religious institution, since the auxiliary's remaining common membership and weekly spiritual practices did not convert the auxiliary from a business organization into a religious institution. SEMECO Indus., Inc. v. Auditing Div. of Utah State Tax Comm'n, 849 P.2d 1167 (Utah 1993).

—Purchase by subcontractor.

The fact that the amount of the tax might be passed along to the general contractor and then on to the church owning the buildings in which the general contrator was installing products did not bring a subcontractor's purchase of materials used in making the products under Subsection (8). Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n, 219 Utah Adv. Rep. 43 (Ct. App. 1993).

"Consumption."

Steel manufacturers who lance pipes, stirring lances, and mill rolls primarily for their use as equipment and only incidentally for their use as ingredients in the manufacturing process are liable for sales and use taxes on the items. Nucor Corp. v. Utah State Tax Comm'n, 832 P.2d 1294 (Utah 1992).

Intrastate movement of freight.

Subsection (17), providing for a sales tax exemption for intrastate movements of freight, is limited to common carriers and does not provide an exemption for intrastate delivery made by the seller in its own trucks. Hales Sand & Gravel, Inc. v. Auditing Div., 842 P.2d 887 (Utah 1992).

Isolated or occasional sale.

The "isolated or occasional sales" exemption applied to the trade-in of used computer equipment by a customer to a retailer of computer systems and thus the retailer's own use of the equipment was exempt from the use tax. Knowledge Data Sys. v. Utah State Tax Comm'n, 229 Utah Adv. Rep. 29 (Utah Ct. App. 1993).

"Manufacturer."

Subsection (15) does not authorize the State Tax Commission to define the term "manufacturer" to restrict the manufacturing sales tax exemption set forth therein; a rule of the Commission limiting the availability of the exemption was invalid. Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm'n, 846 P.2d 1304 (Utah 1993).

Medicine.

Sales tax on sales of oxygen concentrators to

medically dependent individuals was erroneous because oxygen concentrators fall under "any oxygen ... prescribed by a physician" in § 59-12-102(4)(a)(iii). Miller Welding Supply, Inc. v. Utah State Tax Comm'n, 221 Utah Adv. Rep. 8 (Ct. App. 1993).

New or expanding operations.

The commission erroneously interpreted SIC Code 3652, incorporated by reference in Subsection (15), when it determined that activities of video tape producer in expanding its manufacturing capacities did not fall within the scope of the federal definition. Bonneville Int'l Corp. v. Utah State Tax Comm'n, 219 Utah Adv. Rep. 52 (Ct. App. 1993).

Real property.

Where, under its sales contracts, an Illinois corporation fabricated, erected, and installed on its customers' real property large tanks that were not readily removable, and it was not intended that they be moveable or removed, then the installed tanks, once attached, were real property and the corporation was a real property contractor, not a manufacturer, and was not eligible for the exemption for materials used in manufacturing. Chicago Bridge & Iron Co. v. State Tax Comm'n, 839 P.2d 303 (1992).

Where an Illinois corporation's customers intended to purchase fully assembled tanks permanently installed on real estate, whether that real estate was located in Utah or another state was not relevant as to the corporation's status as a real property contractor. Chicago Bridge & Iron Co. v. State Tax Comm'n, 839 P.2d 303 (1992).

Registered vehicle.

—Sale to nonresident.

While taxpayer's legal residence created a legitimate source of dispute, because he maintained a registered vehicle with Utah designated as home state and allowed a vehicle to be kept or used by a Utah resident, the State Tax Commission reasonably found that the taxpayer had resident status for sales tax purposes and thus was disqualified from claiming the nonresident exemption. Putvin v. Utah State Tax Comm'n, 837 P.2d 589 (Utah Ct. App. 1992).

Sale in sister state.

Taxes that come due first take priority over taxes paid first. Therefore, petitioner was liable for the Utah tax first because the sales to petitioner in Utah of materials used in making the finished products occurred long before petitioner sold finished products in Nevada. Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n, 219 Utah Adv. Rep. 43 (Ct. App. 1993).

Sale to state.

Payment for goods by a state warrant does not alone make it a sale to the state or its institutions or political subdivisions to exempt it from sales tax. Rocky Mt. Energy v. Utah Tax Comm'n, 852 P.2d 284 (Utah 1993).

Contractor was not liable for sales tax for materials purchased by and used on behalf of a school district because the purchaser within the meaning of § 59-12-103(1)(l) was the school district. Since the school district was exempt from sales taxes as a subdivision or institution of the state, the fact that the school district had a nonexempt party incorporate the purchased property into its realty did not change the character of the transaction. Brown Plumbing & Heating Co. v. State Tax Comm'n, 224 Utah Adv. Rep. 12 (1993).

Sprays to control disease.

Spraying liquid nitrogen on meat patties to prevent microorganisms that cause disease fits within the plain meaning of Subsection (20), and reference to other rules of statutory construction to determine the proper meaning of this subsection is unnecessary OSI Indus., Inc. v. Utah State Tax Comm'n, 221 Utah Adv. Rep. 34 (Ct. App. 1993).

Cited in Thorup Bros. Constr. v. Auditing Div. of Utah State Tax Comm'n, 221 Utah Adv. Rep. 39 (1993).

59-12-104.1. Exemptions for religious or charitable institutions.

(1) Sales made by religious or charitable institutions or organizations are exempt from the sales and use tax imposed by this chapter if the sale is made in the conduct of the institution's or organization's regular religious or charitable functions or activities.

(2) (a) Sales made to a religious or charitable institution or organization are exempt from the sales and use tax imposed by this chapter if the sale is made in the conduct of the institution's or organization's regular religious or charitable functions and activities.

services that become part of a pollution control facility until the facility is certified, and invoices and records should be retained to show the amount of tax paid. Upon verification of the amount of tax paid for pollution control facilities and verification that a certificate has been obtained, the Tax Commission will refund the taxes paid on these purchases.

1. Claims for refund of tax paid prior to certification must be filed within 180 days after certification of a facility. Refund claims filed within this time period will have interest added at the rate prescribed in Section 59-1-402 from the date of the overpayment.

2. If claims for refund are not filed within 180 days after certification of a facility, it is assumed the delay was for investment purposes, and interest shall be added at the rate prescribed in Section 59-1-402 however, interest will not begin to accrue until 30 days after receipt of the refund request.

B. After the facility is certified, qualifying purchases should be made without paying tax by providing an exemption certificate to the vendor.

1. If sales tax is paid on qualifying purchases for certified pollution control facilities, it will be deemed that the overpayment was made for the purpose of investment. Accordingly, interest, at the rate prescribed in Section 59-1-402, will not begin to accrue until 30 days after receipt of the refund request.

C. In the event part of the pollution control facility is constructed under a real property contract by someone other than the owner, the owner should obtain a statement from the contractor certifying the amount of Utah sales and use tax paid by the contractor and the location of the vendors to whom tax was paid, and the owner will then be entitled to a refund of the tax paid and included in the contract.

D. The owner shall apply to the Tax Commission for a refund using forms furnished by the Tax Commission. The claim for refund must contain sufficient information to support the amount claimed for credit and show that the tax has in fact been paid.

E. The owner shall retain records to support the claim that the project is qualified for the exemption.

R865-19-84S. Sales and Use Tax Exemption For Construction, Expansion, or Modernization of Mineral Facilities Pursuant to Utah Code Ann. Section 59-12-104.

A. Effective July 1, 1984 through June 30, 1989 except as otherwise provided in this rule, sales and leases to any person of materials, machinery, equipment, and services used for a project involving new construction, expansion, or modernization of any mine, mill, reduction works, smelter, refinery (excluding oil and gas refineries), synthetic-fuel processing and upgrading plant, rolling mill, coal-washing plant, or melting facility are exempt from sales and use taxes in Utah. The exemption applies only to projects; construction of which is commenced after July 1, 1984; and to sales and leases which are subject to sales or use tax and which in the aggregate exceed $500,000 during any tax year.

For the purpose of this rule, construction commenced after July 1, 1984 may be evidenced by contracts signed or executed after the date the governor signed Senate Bill No. 22 of the 1984 Budget Session of the Utah Legislature (February 16, 1984) but under which construction was not commenced prior to July 1, 1984. In the absence of a signed contract, there is a rebuttable presumption that the project does not qualify.

B. For purposes of Utah Code Ann. Section 59-12-104:

1. "Person" means any individual, firm, co-partnership, joint venture, corporation, estate or trust, or any group or combination acting as a unit.

2. "Tax year" means July 1 through June 30.

3. "New construction" means:

a. construction of a new mineral facility; or

b. any alteration to the real property of an existing mineral facility other than normal repairs and maintenance.

4. "Expansion" means an increase in production or capacity as a result of the project.

5. "Modernization," except as provided in paragraph D(1) of this rule, means a change or contrast in character or quality resulting from the introduction of improved techniques, methods, or products — including changes necessary to meet health, environmental, or safety standards.

6. "Mineral facility" means any mine, mill, reduction works, smelter, refinery (except oil and gas refineries), synthetic-fuel processing and upgrading plant, rolling mill, coal-washing plant, or melting facility in Utah; including ancillary facilities necessary for and used primarily in the operation of the mineral facility.

7. "Project" means any undertaking involving new construction, expansion, or modernization of a mineral facility.

8. "Owner" means any person who owns or operates a mineral facility in Utah.

9. "Prime contractor" means any contractor dealing directly with the owner of a mineral facility and designated by the owner as a prime contractor.

10. "Normal operating replacements" means supplies, equipment, and tools which replace existing items of a similar nature and which do not enhance the productive capacity of a mineral facility beyond that normally associated with new equipment as compared with old.

C. The first $500,000 of the aggregated taxable sales or leases subject to either sales or use tax which are made to any person for use in a project in a tax year will be taxed. For purposes of assigning sales and leases to the appropriate tax year, the date of delivery to the person or to a common carrier for delivery to the person is determinative.

D. The exemption shall not apply to, and the $500,000 base shall not include:

1. sales and leases of pollution control facilities which qualify for sales and use tax exemption under Utah law;

2. sales and leases of normal operating replacements and supplies not used in a project;

3. sales and leases subject to another state's sales or use tax, except the amount subject to use taxes in Utah as a result of a lower tax rate in another state;

4. construction equipment and fungible tools or supplies sold or leased to a contractor, subcontractor, or individual acting in a similar capacity, which is not entirely consumed or physically incorporated into a project. This provision does not preclude exemption for sales and leases made to the owner for use in or on a project;

5. leases of construction equipment for nonexclusive use on a project will not be eligible for sales and use tax exemption except to the extent of any lease period during which the equipment is used exclusively on the project.

E. A person may seek a declaratory judgment according to Tax Commission Rule R861-1-5A to determine that the project is a new construction, expansion, or modernization project Pursuant to Utah Code Ann. Section 59-12-104. If denied, the Commission may grant a rehearing to reconsider the request for a declaratory judgment under the provisions of Rule R861-1-5A.

F. Upon application, the Tax Commission shall issue the project a sales tax exemption number or numbers to be used by the owner of the project, or by any prime contractor designated by the owner, in purchasing tangible personal property for use in the project. If the purchaser is unable to differentiate tangible personal property being bought for exempt use in the project from other property at the time of purchase, all purchases shall be taxed. Each quarter, the owner and the prime contractor(s) shall file sales and use tax returns which disclose the total cost of tangible personal property purchased for purposes that do not qualify for exemption under the provisions of Utah Code Ann. Section 59-12-104, including the $500,000 minimum annual amount. This return must be filed in accordance with the provisions set forth in Utah Code Ann. Section 59-12-107.

G. For any tangible personal property entirely consumed or physically incorporated into a project by a person other than the owner or his designated prime contractor, or in the case of sales or use taxes paid by the owner or his prime contractor under conditions set forth in paragraph F of this rule, exemption shall be claimed in the following manner:

1. The owner must prepare a schedule showing the amount of sales and use taxes paid by him or his prime contractor on the purchases actually consumed or incorporated into a project, and to this amount shall add the amount of sales and use taxes paid by subcontractors. This schedule must disclose:

a. the items used;

b. the county of purchase, if bought within the state of Utah; and

c. the taxes paid.

2. The owner shall apply to the Tax Commission for a refund using forms furnished by the Tax Commission. The claim for refund must contain sufficient records and information to:

a. determine the county in which the sale was originally made;

b. support the amount claimed for credit and show that tax has in fact been paid on the first $500,000 subject to Utah tax each year.

3. The owner shall retain records to support the claim that the project is qualified for the exemption under paragraph A of this rule.

Refunds not paid and mailed within thirty (30) days after receipt by the Tax Commission will have interest added at the rate prescribed in Utah Code Ann. Section 59-1-402.

R865-19-85S. Machinery and Equipment Exemption For Use in Certain Manufacturing Facilities Pursuant to Utah Code Ann. Section 59-12-104.

A. Definitions:

1. "Machinery" means electronic or mechanical machines incorporated into a manufacturing or assembling process from the initial stage where actual processing begins through the completion of the finished end product, including final processing, finishing or packaging of articles which are sold as tangible personal property.

Automated material handling and storage machinery is included in this definition when such machinery is part of the integrated continuous production cycle.

2. "Equipment" means any independent device separate from any machinery but essential to an integrated or continuous manufacturing or assembly process or any subunit comprising a component of any machinery or auxiliary thereof, including such items as dies, jigs, patterns, molds, and similar items used in manufacturing, processing, or assembling. Qualifying equipment also includes devices necessary to the control or operation of machinery and equipment qualifying under this rule even though not located in the specific manufacturing area.

3. "New or expanding operations" means manufacturing, processing, or assembling activities which:

a) are substantially different in nature, character, or purpose from prior activities;

b) are begun in a new physical plant location in Utah; or

c) increase production or capacity. This definition is subject to limitations dealing with normal operating replacements.

4. "Manufacturer" means a person who:

a) functions within the activities included in SIC code classification 2000-3999;

b) produces a new, reconditioned, or remanufactured product, article, substance, or commodity from raw, semi-finished, or used material; and

c) in the normal course of business produces products which are sold as tangible personal property.

5. "Establishment" means an economic unit of operations that is generally at a single physical location in Utah where qualifying manufacturing activities are performed. Where distinct and separate economic activities are performed at a single physical location, each activity should be treated as a separate establishment.

6. "Normal operating replacements" means machinery or equipment which replaces existing machinery or equipment of a similar nature, even if the use results in increased plant production or capacity.

(a) If new machinery or equipment is purchased or leased which has the same or similar purpose as machinery or equipment retired from service within 12 months before or after the purchase date, such machinery or equipment is considered as replacement and is not exempt.

b) If existing machinery or equipment is kept for back-up or infrequent use; new, similar machinery or equipment purchased would be considered as replacement and is not exempt.

7. "Improvement" is defined in Utah Code Ann. Section 59-2 102(3).

B. Application of Exemption:

1. The machinery and equipment exemption applies only to tangible personal property. It does not apply to real property or to tangible personal property which is purchased and becomes an improvement to real property. The exemption does not apply to charges for labor to repair, renovate, or clean machinery or equipment.

2. Machinery or equipment used for an activity which is not part of the manufacturing process, such as research and development; refrigerated or other storage of raw materials, component parts, or the finished product; or shipping the finished product is not exempt.

3. Machinery or equipment with a useful economic and/or accounting life of less than three years is not eligible for the exemption.

4. Machinery or equipment purchased or leased for use in activities which may qualify it for exemption, as well as in other activities, will not lose the exemption if the use in nonqualifying activities is determined to be de minimis. Nonqualifying activities are activities such as maintenance or production of tangi-

ble personal property that is not sold in arms length transactions

5 Sales of manufactured tangible personal property may be at retail as defined in rule R865 19 27S or at wholesale as defined in rule R865 19 29S but they must be arms length sales for the exemption to qualify An arms length sale is defined as a transaction that occurs in an open market, between unrelated parties and neither party is under duress to buy or sell

6 The manufacturer shall retain records to support the claim that the machinery and equipment are qualified for exemption under the provisions of this rule

7 A person may seek a declaratory judgment according to Tax Commission Rule R861 1 5A to determine whether any particular purchase or lease qualifies for this particular exemption If denied, the Tax Commission may grant a hearing to reconsider the request for a declaratory judgment under the provisions of Rule R861 1 13A

8 Exemption will be allowed for any qualified purchase or lease if delivery to the buyer or to a carrier for shipment to the buyer or lessee, takes place on or after July 1, 1985

C Vendors are required to obtain a tax exemption certificate upon which the purchaser certifies that the use of the machinery or equipment qualifies for exemption under Utah Code Ann Title 59, Chapter 12

D The effective date of this rule is July 1, 1991

R865-19-86S. Monthly Payment of Sales Taxes Pursuant to Utah Code Ann Section 59-12-108.

A Definitions

1 For purposes of the monthly filing and the electronic remittance of sales taxes, the term "tax liability for the previous year" means the tax liability for the previous calendar year

2 "Fiscal year" means the year commencing on July 1 and ending the following June 30

3 "Mandatory filer" means a vendor who meets the threshold requirements for monthly filing and remittance of sales taxes or for electronic funds transfer (EFT) remittance of sales taxes

4 "Cash equivalent" means either

a) cash,

b) wire transfer, or

c) cashier's check drawn on the bank in which the Tax Commission deposits sales tax receipts

B The determination that a vendor is a mandatory filer shall be made by the Tax Commission at the end of each calendar year and shall be effective for the fiscal year

C A vendor who meets the qualifications for a mandatory filer but does not receive notification from the Tax Commission to that effect, is not excused from the requirements of monthly filing and remittance or EFT remittance

D Mandatory filers shall also file and remit any waste tire fees and transient room, resort communities, and tourism recreation, cultural, and convention facilities taxes to the commission on a monthly basis or by EFT respectively

E Vendors who are not mandatory filers may elect to file and remit their sales taxes to the commission on a monthly basis or remit sales taxes by EFT or both

1 The election to file and remit sales taxes on a monthly basis or to remit sales taxes by EFT is effective for the immediate fiscal year and every fiscal year thereafter unless the Tax Commission receives written notification prior to the commencement of a fiscal year that the vendor no longer elects to file and remit sales taxes on a monthly basis, or to remit sales taxes by EFT, respectively

2 Vendors who elect to file and remit sales taxes on a monthly basis, or to remit sales taxes by EFT, are subject to the same requirements and penalties as mandatory filers

3 Vendors who elect to file and remit sales taxes on a monthly basis are not entitled to reimbursement for the cost of collecting and remitting sales taxes on a monthly basis

F Vendors who are not mandatory filers may request mandatory filer designation if they expect to incur a $50,000 tax liability for the current calendar year and the business they operate

1 has had no prior history in Utah,

2 is a new business that was formed within the previous calendar year,

3 was formed within the previous calendar year as the result of a merger, or

4 expects a significant increase in its operations

G A vendor who requests mandatory filer designation under F shall file and remit sales taxes on a monthly basis, commencing with the first month of a calendar quarter, but shall not be treated as a mandatory filer until the month following the month in which that vendor's sales tax liability totals $50,000

1 Upon designation as a mandatory filer, the vendor shall be entitled to reimbursement for the cost of collecting and remitting sales taxes

2 The mandatory filer designation shall remain in effect for the remainder of the fiscal year

H Vendors who are mandatory filers may request deletion of their mandatory filer designation if they do not expect to accumulate a $50,000 sales tax liability for the current calendar year

1 The request must be accompanied by documentation clearly evidencing that the business that led to the $50,000 tax liability for the previous year will not recur

2 The request must be made prior to the commencement of a fiscal year

3 If a vendor's request is approved and the vendor does accumulate a $50,000 sales tax liability, a similar request by that vendor the following year shall be denied

I No reimbursement is allowed for the monthly filing and remittance of waste tire fees or transient room, resort communities, tourism recreation, cultural, and convention facilities taxes

J Only mandatory filers who file and remit on a timely basis and in the required manner, are entitled to reimbursement for the cost of collecting and remitting sales taxes

K Vendors who are required to remit sales tax by EFT may, following approval by the Tax Commission, remit a cash equivalent in lieu of the EFT

1 Approval for remittance by cash equivalent shall be limited to those vendors who are able to establish that remittance by EFT would cause a hardship to their organization

2 Requests for approval shall be directed to the Deputy Executive Director of the Tax Commission

3 Vendors who receive approval to remit their sales taxes by cash equivalent shall ensure that the cash equivalent is received at the Tax Commission's main office no later than three working days prior to the due date of the sales tax

L Vendors who are required to remit sales taxes by EFT but remit these taxes by some means other than EFT or a Tax Commission approved cash equivalent, are not entitled to reimbursement for the cost of collecting and remitting sales taxes and are subject to penalties

M Prior to remittance of sales taxes by EFT, a vendor shall complete an EFT agreement with the Tax Commission The EFT Agreement shall indicate that all EFT payments shall be made in one of the following manners

1 Except as provided in M 2 , vendors shall remit their EFT payment by an ACH-debit transaction through the National Automated Clearing House Association (NACHA) system CCD application

2 If an organization's bylaws prohibit third party access to its bank account or extenuating circumstances exist, a vendor may remit its EFT payment by an ACH credit with tax payment addendum transaction through the NACHA system CCD Plus application

N In unusual circumstances, a particular EFT payment may be accomplished in a manner other than that specified in Subsection M Use of any manner of remittance other than that specified in Subsection M must be approved by the Tax Commission prior to its use

R865-19-87S. Government-Owned Tooling and Equipment Exemption Pursuant to Utah Code Ann. Section 59-12-104.

A As used in Utah Code Ann Section 59-12-104(6), and for the purpose of this rule

1 "Tooling" means jigs, dies, fixtures, molds, patterns, tapes, gauges, test equipment, other equipment, and other similar manufacturing aids generally available as stock items

2 "Special Tooling" means jigs, dies, fixtures, molds, patterns, tapes, gauges, other equipment and manufacturing aids, and all components of these items that are of such a specialized nature that without substantial modification or alteration their use is limited to the development or production of particular supplies or parts thereof or performing particular services

3 "Support equipment" means implements or devices that are required to inspect, test, service, adjust, calibrate, appraise, transport, safeguard, record, gauge, measure, repair, overhaul, assemble, disassemble, handle, store, actuate or otherwise maintain the intended functional operation status of an aerospace electronic system

4 "Special test equipment" means either single or multipurpose integrated test units engineered, designed, fabricated, or modified to accomplish special purpose testing in performing a contract These test ing units may be electrical, electronic, hydraulic, pneumatic, or mechanical Or they may be items or assemblies of equipment that are mechanically, electrically, or electronically interconnected so as to become a new functional entity, causing the individual item or items to become interdependent and essential in performing special purpose testing in the development or production of peculiar supplies or services

B The effective date of this rule is July 1, 1986

R865-19-88S Requirement to Report Certain Sales Pursuant to Utah Code Ann. Section 59-12-105

A Every retailer is required to report on its Utah sales and use tax return all exempt sales of farm machinery, equipment, and supplies The total amount reported applies to transactions exempt under Utah Code Ann Section 59 12 104(22) and should not include sales that are exempt under other provisions of the law such as sales to church operated farms, sales to non Utah farmers when delivery is made outside Utah, sales for resale etc

B Every licensed or registered consumer must report on its sales and use tax return the total amount of purchases and leases of materials, machinery, equipment, and services used in a qualified Utah mineral facility expansion or modernization project Refer to Utah Code Ann Section 59 12 104(15) and Rule R865 19 84S for information regarding this exemption

C Every licensed or registered manufacturer must report on its sales and use tax return the total purchases or leases of machinery and equipment for use in new or expanding Utah manufacturing facilities Refer to Utah Code Ann Section 59 12 104(16) and Rule R865 19 85S for information regarding this exemption

D If the retailer or the purchaser fails to report the amount of the exempt sales or purchases in the appropriate section provided on the sales and use tax returns for each reporting period, the Tax Commission shall disallow the exemptions granted under Utah Code Ann Section 59 12 104(15), (16), and (22)

E Requirements and provisions of this rule apply to all purchases and/or sales made on or after July 1, 1986

R865-19-90S Telephone Service Defined Pursuant to Utah Code Ann Section 59-12-103

A "Telephone service" means the transmission for hire of signs, signals, writings, images, sounds, messages, data, or other information of any nature by wire, radio, light waves, or other electromagnetic means, and includes the following

1 Nonrecurring telephone service charges are telephone service charges which are ordinarily charged to subscribers only once or only under exceptional circumstances

a Nonrecurring telephone service charges include, but are not limited to charges for initially establishing telephone service, changing the type of telephone service being provided, changing the types of features, options, or enhancements being provided in connection with a particular type of telephone service, disconnecting the subscriber s telephone service, disconnecting a feature or features being provided with a subscriber's telephone service, analyzing or repairing the cause of malfunctions in a subscriber's telecommunications equipment apparatus or system, and installing on a subscriber s premises telecommunication equipment or apparatus which does not become a fixture of real property

b Nonrecurring telephone service charges exclude, but not by way of limitation charges for subscriber's premises telecommunications equipment or apparatus which becomes a fixture of real property, such as the installation of inside wire, subscriber deposits, interest, late charges, contributions in aid of construction, land development fees, payments in lieu of land development fees and special plant construction and facilities relocation charges

c Nonrecurring services involving real property transactions shall be taxed in accordance with rule R865 19 58S

2 Subscriber line charges, regardless of how they may be referred to in the future for telephone service that were referred to or created by the Federal Communication Commission in FCC Docket Number 78 72, are telephone service

B "Telephone corporation" means any corporation owning, controlling, operating or managing any telephone service for the shared use with or resale to any

Addendum 2

8. [Mrs. Morgan's] attorneys' fees in the amount of $67,567.35 are reasonable. The Court finds that this was a complicated estate and presented difficult legal and factual issues under the best of circumstances. The task of locating and valuating the assets of the marital estate [was] complicated and made more difficult by [Dr. Morgan's] failure to cooperate, thereby necessitating extensive formal discovery.

In the instant case, the evidence was sufficient to support the trial court's findings that Mrs. Morgan has a need for attorney fees, that Dr. Morgan has the ability to pay those fees, and that such fees were reasonable. Accordingly, the trial court did not abuse its discretion in awarding attorney fees to Mrs. Morgan.[5]

CONCLUSION

Dr. Morgan's objection to the trial court's amended findings of fact and conclusions of law concerning the distribution of the parties' stocks is moot. Further, the trial court did not abuse its discretion in valuing and distributing the parties' property, nor in awarding alimony and attorney fees to Mrs. Morgan. Accordingly, we affirm.

BENCH and BILLINGS, JJ., concur.

5. While the trial court did not abuse its discretion in awarding attorney fees to Mrs. Morgan, the record reflects, and Mrs. Morgan concedes, that the trial court miscalculated the amount of fees to be awarded. In the prior appeal, we determined that the trial court improperly awarded $11,617.44 in costs to Mrs. Morgan. *See Morgan v. Morgan*, 795 P.2d 684, 686 (Utah App.1990). Subtracting the disallowed costs from $75,000 (the combined amount initially awarded by the trial court), the correct amount of attorney fees is $63,382.56, not $67,567.35 as calculated by the trial court on remand.

ALBERTSONS, INC., an Idaho corporation, Petitioner,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, and Gayle Fullerton, Respondents.

No. 920530–CA.

Court of Appeals of Utah.

May 18, 1993.

Employer appealed final decision of Board of Review of Utah Industrial Commission awarding unemployment compensation benefits to claimant. The Court of Appeals, Billings, P.J., held that substantial evidence supported finding that claimant did not willfully destroy employer's property, and board reasonably concluded that claimant was not discharged for just cause.

Affirmed.

1. Administrative Law and Procedure ⇐788

Social Security and Public Welfare ⇐651.1

Decision of Board of Review of Utah Industrial Commission awarding unemployment compensation benefits would be reviewed for reasonableness. U.C.A.1953, 63–46b–16(4)(h)(i).

2. Social Security and Public Welfare ⇐562.5

Employer bears burden of proving just cause for termination of claimant of unemployment benefits. U.C.A.1953, 35–4–5(b)(1).

3. Social Security and Public Welfare ⇐562.5

Employer claiming employee seeking unemployment benefits was discharged for "just cause" must show culpability, knowledge and control; the failure to establish any one of the three factors is fatal to employer's claim of just cause. U.C.A. 1953, 35–4–5(b)(1).

4. Social Security and Public Welfare ⇐584.6

Substantial evidence supported finding of administrative law judge, adopted by Board of Review of Utah Industrial Commission, that damage to employer's equipment was an accident and claimant of employment benefits did not willfully destroy employer's property, and Board's determination that claimant's conduct did not give rise to level of culpability required to deny unemployment benefits was reasonable. U.C.A.1953, 35–4–5(b)(1), 63–46b–16(4), (4)(d), (4)(h)(i).

5. Administrative Law and Procedure ⇐791

Court grants great deference to agency's findings, and will uphold them if they are supported by substantial evidence when they are viewed in light of whole record before court.

6. Administrative Law and Procedure ⇐791

"Substantial evidence" in support of an agency's findings is such relevant evidence as a reasonable mind might accept as adequate to support conclusion.

See publication Words and Phrases for other judicial constructions and definitions.

7. Administrative Law and Procedure ⇐791

In applying substantial evidence test in reviewing agency decision, court will review whole record and consider both evidence that supports agency's findings and evidence that fairly detracts from them.

8. Administrative Law and Procedure ⇐786

Social Security and Public Welfare ⇐663

Court reviewing decision of Board of Review of Utah Industrial Commission will defer to Board's assessment of conflicting evidence. U.C.A.1953, 35–4–5(b)(1), 63–46b–16(4), (4)(d).

John S. Chindlund, Robert G. Wing, and Roger J. McConkie, Prince, Yeates & Geldzahler, Salt Lake City, for petitioner.

K. Allan Zabel and Emma R. Thomas, Sp. Asst. Attys. Gen., Dept. of Employment Sec., Salt Lake City, for respondents.

Before BILLINGS, P.J., GARFF and GREENWOOD, JJ.

BILLINGS, Presiding Judge:

Petitioner Albertsons, Inc. (Albertsons), appeals the final decision of the Board of Review of the Utah Industrial Commission (Board) awarding unemployment compensation benefits to the claimant, Gayle Fullerton (Fullerton). In affirming the decision of the Administrative Law Judge (ALJ), a majority of the Board concluded Fullerton was not discharged from his employment for "just cause" under Utah Code Ann. § 35–4–5(b)(1) (Supp.1992). We affirm.

FACTS

On April 3, 1992, Albertsons discharged Fullerton, an eleven year employee, claiming he damaged an Albertsons forklift. The incident resulting in Fullerton's termination occurred on April 2, 1992, and involved changing a 1500 pound forklift battery. To change a battery, the battery must first be pushed out of the forklift onto a rack system with rollers. A new battery is then moved onto the forklift with rollers and held in place by a heavy metal plate. This process takes two people.

Fullerton and Earl Ellis (Ellis), the maintenance worker assisting Fullerton with the battery change, describe the incident at issue differently. Fullerton claims he accidentally damaged the forklift. According to Fullerton, he slipped while standing on the oily rollers and as he fell the metal plate he was holding in his hand inadvertently hit the forklift twice before he regained his balance. Fullerton maintains he did not break the plastic cover to the forklift battery, he claims it was broken before he went into the battery area.

Conversely, Ellis claims the damage done to the forklift was intentional. Ellis testified he personally saw Fullerton beat on the forklift resulting in damage to the battery cover. According to Ellis, Fullerton had trouble putting the retaining plate on the forklift and "started beating on the machine." Ellis reported to Albertsons that Fullerton purposely damaged the battery cover. However, Fullerton claims Ellis's testimony is inaccurate because Ellis could not see his feet from where he was standing and thus could not see whether he slipped.

Albertsons's company policy allows for the immediate dismissal of an employee who willfully damages company property. Fullerton was aware of the policy, having signed a company policy sheet on April 8, 1991, which set forth among other causes of dismissal the "[u]nauthorized ... damage to company ... property."

As a result of this incident, Fullerton's supervisor dismissed Fullerton on April 3, 1992, finding Fullerton willfully broke the plastic battery cover. The supervisor based his decision on Ellis's report and Fullerton's past record of similar reprimands.[1]

Fullerton applied for unemployment insurance compensation after his discharge from employment at Albertsons. The Utah Department of Employment Security denied benefits. Fullerton objected to the ruling and a hearing was held before an ALJ on June 1, 1992.

The ALJ awarded benefits to Fullerton. Acknowledging the conflict in testimony, the ALJ found the damage done to the Albertsons forklift was accidental. The ALJ stated:

> While their [Fullerton's and Ellis's] testimony is different, the claimant seems more credible to the Administrative Law Judge....
>
> ....
>
> The employer did not establish by a preponderance of the evidence that the claimant's actions rose to the level of culpability, knowledge and control to impose a disqualification. The claimant's testimony is accepted that the damage done on April 2, 1992 was accidental.

In reaching this determination, the ALJ gave Fullerton's past reprimands no weight. The ALJ found Albertsons violated its union agreement by considering past reprimands when deciding to dismiss Fullerton, since both incidents occurred more than two years earlier, well outside the time limitation for consideration under the union contract.

Albertsons appealed the decision of the ALJ to the Board. On July 27, 1992, the Board, with one dissent, adopted the findings of the ALJ and affirmed the decision of the ALJ that Albertsons did not have just cause within the meaning of section 35-4-5(b)(1) for discharging Fullerton. The Board found:

> In affirming the decision of the Administrative Law Judge, the Board of Review notes that the employer is correct in its argument that *this case hinges on balancing the respective credibility of Mr. Ellis and the claimant.* The ALJ, who had the opportunity to observe the demeanor of both witnesses, made a specific finding that the claimant "seems more credible to the Administrative Law Judge." The Board of Review only reviews written transcripts and documents associated with the Administrative Law Judge hearing and does not have the opportunity to observe witnesses. *The Board must, therefore, rely on the impressions of the ALJ on matters of credibility derived from observing the demeanor of the witness.* Since the Administrative Law Judge found the claimant to be more believable than the employer witness and since the ALJ's finding of fact that the claimant accidentally slipped and inadvertently broke the battery plate is supported by substantial evidence in the record, the Board affirms that finding and affirms the Administrative Law Judge's decision that the employer did not have just cause within the meaning of the Utah Employment Security Act for discharging the claimant. (Emphasis added).

On appeal, Albertsons claims Fullerton was terminated for just cause because he willfully destroyed company property, and knew, or should have known, his actions could result in his termination. In so claiming, Albertsons essentially challenges the Board's finding the incident was accidental.

1. Prior to the April 2, 1992 incident, Fullerton received two warning notices from Albertsons. In April of 1989, Fullerton, while talking to another employee about a business matter, forgot he had not lowered the forks on his forklift. When he drove away the forks caught an object which resulted in the forklift tipping over. Fullerton was placed on suspension without pay from April 20, 1989 to April 25, 1989.

   The second warning was in January of 1990 when Fullerton kicked and damaged a door while "horsing around" with members of his crew on Super Bowl Sunday. For this infraction Fullerton received two weeks suspension without pay.

   Importantly, Albertsons has a union contract which provides that warnings will not remain in effect for more than one year.

STANDARD OF REVIEW

These proceedings were commenced after January 1, 1988, therefore our review is governed by the Utah Administrative Procedures Act (UAPA). *See* Utah Code Ann. § 63-46b-0.5 to -22 (1989 & Supp.1992). Judicial review of agency action under UAPA is controlled by Utah Code Ann. § 63-46b-16 (1989).

[1] Because this appeal involves the application or interpretation of an agency-specific statute we must determine whether review is under section 63-46b-16(4)(d) or section 63-46b-16(4)(h)(i).[2] *See SEMECO Indus., Inc. v. Auditing Div.*, 849 P.2d 1167, 1173 (Utah 1993) (Durham, J., dissenting); *King v. Industrial Comm'n*, 850 P.2d 1281, 1285-1286 (Utah App.1993). If Utah Code Ann. § 35-4-5(b)(1) (Supp.1992) contains a legislative grant of discretion to the Board, we review under section 63-46b-16(4)(h)(i) for reasonableness. However, if it contains no grant of discretion, we review under section 63-46b-16(4)(d) for correction of error. *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 587-89 (Utah 1991); *King*, 850 P.2d at 1285-1286. *See also SEMECO*, 849 P.2d at 1173 (Durham, J., dissenting).

Section 35-4-5(b)(1) provides a claimant is ineligible for unemployment benefits if the individual is "discharged for just cause ... if so found by the commission." Utah Code Ann. § 35-4-5(b)(1) (Supp.1992). This explicit grant of discretion to the Industrial Commission to apply the statute requires we review the Board's action under section 63-46b-16(4)(h)(i) for reasonableness. *See Morton*, 814 P.2d at 589; *King*, 850 P.2d at 1291. *See also Bhatia v. Department of Employment Sec.*, 834 P.2d 574, 577 (Utah App.1992); *Gibson v. Department of Employment Sec.*, 840 P.2d 780, 783 (Utah App.1992); *Wagstaff v. Department of Employment Sec.*, 826 P.2d 1069, 1072 (Utah App.1992); *Department of Air Force v. Swider*, 824 P.2d 448, 451 (Utah App.1991).

JUST CAUSE TERMINATION

[2, 3] In this appeal we must decide whether the Board reasonably concluded Fullerton was not discharged for just cause and is therefore entitled to unemployment benefits. Albertsons bears the burden of proving just cause for Fullerton's termination. *See* Utah Code Admin.P. R562-5b-103; *Bhatia*, 834 P.2d at 577. To establish just cause, Albertsons must show Fullerton's conduct involved three factors: 1) culpability, 2) knowledge and 3) control. *See* Utah Code Admin.P. R562-5b-102.[3] *Ac-*

2. Section 63-46b-16(4) provides in part:
   (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
   ....
   (d) the agency has erroneously interpreted or applied the law;
   ....
   (h) the agency action is:
   (i) an abuse of the discretion delegated to the agency by statute;....
   Utah Code Ann. § 63-46b-16(4) (1989).

3. Counsel for Albertsons erroneously cites to Utah Code Admin.P. R475-5b-102 (1991) for the factors which establish just cause. The Administrative Code has been renumbered in the 1992 version and Utah Code Admin.P. R562-5b-102

cord Bhatia v Department of Employment Sec 834 P 2d 574 577 (Utah App 1992) *Nelson v Department of Employment Sec*, 801 P 2d 158 161 (Utah App 1990) 'The failure to establish any one of the three factors is fatal to [the employer s] claim of just cause" *Department of Air Force v Department of Employment Sec*, 786 P 2d 1361, 1364 (Utah App 1990) *cert denied sub nom US v Industrial Comm'n*, 795 P 2d 1138 (Utah 1990) (citing *Pro-Benefit Staffing, Inc v Board of Review*, 775 P 2d 439, 442-43 (Utah App 1989)) In the instant case we need not reach the issues of knowledge and control as we uphold the Board's determination that Fullerton's conduct was not culpable

Culpability

[4] Rule R562-5b-102(1)(a) provides guidance to the Board in determining whether an employee s conduct was sufficiently culpable to deny benefits In defining culpability, these regulations provide

> [t]he wrongness of the conduct must be considered in the context of the particular employment and how it affects the employer's rights If the conduct was an isolated incident of poor judgment and there is no expectation that the conduct will be continued or repeated, potential harm may not be shown and therefore it is not necessary to discharge the employee

Utah Code Admin P R562-5b-102(1)(a) *See Gibson v Department of Employment Sec*, 840 P 2d 780, 783-84 (Utah App 1992), *Nelson v Department of Employment Sec*, 801 P 2d 158, 161-62 (Utah App 1990), *Pro-Benefit Staffing, Inc v Board of Review*, 775 P 2d 439, 443 (Utah App 1989)

In *Gibson*, this court called for a liberal construction of the Employment Security Act to assist those attached to the work force, stating " 'mere inefficiency or failure of good performance as the result of inability or incapacity, inadvertences, isolated instances of ordinary negligence, or good faith errors in judgment or decisions do not constitute culpable conduct which precludes a discharged employee from receiving unemployment compensation benefits ' *Gibson* 840 P 2d at 783 (quoting *Logan Regional Hosp v Board of Review*, 723 P 2d 427, 429 (Utah 1986))

In resolving the conflicting testimony, the ALJ found "the claimant seems more credible to the Administrative Law Judge," thus "[t]he claimant's testimony is accepted that the damage done on April 2, 1992 was accidental"

In affirming the decision of the ALJ, the Board adopted the ALJ's Findings of Fact and Conclusions of Law The Board stated

> The Board must, therefore, rely on the impressions of the ALJ on matters of credibility derived from observing the demeanor of the witnesses Since the Administrative Law Judge found the claimant to be more believable than the employer witness the Board affirms that finding

[5-7] Albertsons necessarily challenges the Board's finding that Fullerton did not intentionally beat on an Albertsons forklift in their effort to demonstrate Fullerton's conduct was culpable In seeking to overturn the Board's factual findings Albertsons bears a heavy burden "[T]his court grants great deference to an agency's findings, and will uphold them if they are 'supported by substantial evidence when viewed in light of the whole record before the court' " *Department of Air Force v Swider*, 824 P 2d 448, 451 (Utah App 1991) (quoting Utah Code Ann § 63-46b-16(4)(g) (1989)) " 'Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" ' " *Grace Drilling Co v Board of Review*, 776 P 2d 63, 68 (Utah App 1989) (quoting *Idaho State Ins Fund v Huntcutt*, 715 P 2d 927, 930 (Idaho 1985) (quoting *Consolo v Federal Maritime Comm'n*, 383 U S 607 620 86 S Ct 1018, 1026, 16 L Ed 2d 131 (1966))) 'In applying the substantial evidence test, we review the 'whole record' before the court and consider both evidence that supports the Board s findings and evidence that fairly detracts from them ' *Swider*, 824 P 2d at 451

[8] We defer to the Board's assessment of conflicting evidence We are in no position to second guess the detailed findings of the ALJ which were adopted by the Board It is not our role to judge the relative credibility of witnesses "In undertaking such a review, this court will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review" *Grace Drilling*, 776 P 2d at 68 "It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences" *Id Accord Logan Regional Hosp v Board of Review*, 723 P 2d 427, 428 (Utah 1986), *Buick v Department of Employment Sec*, 752 P 2d 358, 360 (Utah App 1988)

Accepting Fullerton's testimony, as did the ALJ and the Board, there is substantial evidence to support a finding the incident was an accident and Fullerton did not willfully destroy Albertsons's property Thus, we find reasonable the Board's determination that Fullerton's conduct did not rise to the level of culpability required to deny unemployment benefits

CONCLUSION

We defer to the Board's assessment of conflicting evidence, and find reasonable the Board's determination that Albertsons did not have just cause within the meaning of the Utah Employment Security Act for discharging Fullerton Therefore, we affirm the award of unemployment compensation benefits to Fullerton

GARFF and GREENWOOD, JJ , concur

(1992) is the applicable rule since the incident at issue occurred in 1992

Keith C HOLT and Joyce S Holt, Plaintiffs and Appellants,

v

Manuel KATSANEVAS, Defendant and Appellee

No 920225-CA

Court of Appeals of Utah

May 19 1993

Vendors sued purchasers of real estate for breach of real estate sales contract The Third District Court, Salt Lake County, Pat B Brian, J , entered judgment for purchasers, and vendors appealed The Court of Appeals, Greenwood J , held that (1) material issue of fact as to oral modification of contract precluded summary judgment, and (2) oral modification of real estate contract was enforceable

Reversed and remanded

Orme, J , concurred in result

1. Appeal and Error ⇐842(2), 934(1)

In considering appeal of grant or denial of summary judgment, court reviews facts and all reasonable inferences from them in light most favorable to losing party, and legal conclusions reached by trial court are accorded no deference, but instead, are reviewed for correctness Rules Civ Proc , Rule 56(c)

2. Judgment ⇐181(29)

Material issue of fact as to whether vendor and purchaser of real estate under installment contract intended purchaser's payment of mortgage on land to be applied to payment due at beginning or at end of contract term precluded summary judgment for purchaser in vendor s action for breach of promise to make installment payments Rules Civ Proc , Rule 56(c)

3 Frauds, Statute of ⇐129(12), 131(1)

Generally if original agreement was required to comply with statute of frauds any material modification of that agreement must also conform to statute of frauds, however transactions for sale of

364 N.E.2d 349 printed in FULL format.

HARRIS TRUST AND SAVINGS BANK, Trustee, et al. , Plaintiffs, v. GERALDINE SWIFT TAYLOR et al. , Defendants-(JOSEPH L. MACK et al. , Defendants-Appellants; GERALDINE SWIFT TAYLOR et al. , Defendants-Appellees).

HARRIS TRUST & SAV. BANK v. TAYLOR

No. 76-661

Appellate Court of Illinois; First District (5th Division)

49 Ill. App. 3d 349; 364 N.E.2d 349; 7 Ill. Dec. 188

May 20, 1977.

PRIOR HISTORY:

APPEAL from the Circuit Court of Cook County; the Hon. DANIEL A. COVELLI, Judge, presiding.

DISPOSITION: Judgment affirmed.

COUNSEL: Joseph L. Mack and Samuel L. Bullas, both of Chicago (Nathan Bennett, of counsel), for appellants.

Winston & Strawn, of Chicago (Calvin Sawyier, Logan T. Johnston, III, and R. David Bergonia, of counsel), for appellees.

OPINIONBY: WILSON

OPINION: [*350] [**351] [***190] Mr. JUSTICE WILSON delivered the opinion of the court:

This is an appeal from an order of the Circuit Court of Cook County instructing the trustees of seven trusts as to the proper interpretation of a tax apportionment provision common to the seven trust agreements creating their trusts. The only issue raised on appeal is whether the court correctly construed this provision. We affirm.

On December 30, 1933, Geraldine Swift (who subsequently became Mrs. Geraldine Swift Taylor) executed a trust agreement creating an irrevocable inter vivos trust (hereinafter Taylor trust A). The sole original trustee of this trust was Gustavus F. Swift, the settlor's father. [*351] After his death in 1943, Harris Trust and Savings Bank (hereinafter Harris) became the sole successor trustee.

On December 27, 1938, Mrs. Taylor executed a second trust agreement creating another irrevocable inter vivos trust (hereinafter Taylor trust B). As with the former trust, the sole original trustee of this trust was Gustavus F. Swift. In contrast to the former trust, after the original trustee's death, Harris, Gustavus F. Swift, Jr., and A. Thomas Taylor (Mrs. Taylor's husband) became successor co-trustees.

Both trust agreements gave the original trustee a discretionary power to accumulate income. These accumulation powers terminated at his death. Thereafter, income from Taylor trust A became payable to Mrs. Taylor. On her death, this income will be payable to her children and per stirpes to their respective lineal descendants if any child of hers has predeceased her or survives her but dies before the termination of the trust. Parenthetically, Mrs. Taylor's children are: Thomas S. Taylor, Geraldine T. McLaughlin, Gustavus F. Taylor and Richard F. Taylor; and the lineal descendants of these children are Fiona M. Taylor, Alexandra T. McLaughlin, Geraldine S. McLaughlin and Peter B. McLaughlin, Jr., all of whom are minors. After the death of the last survivor of Mrs. Taylor, her children and their lineal descendants, this income is payable to her siblings and per stirpes to their respective lineal descendants if any sibling has predeceased this survivor or survives same but dies before the termination of the trust. Mrs. Taylor's siblings are Marie S. Spiel, Jane S. Moore and Gustavus F. Swift, Jr., and the lineal descendants of these siblings are: Robert E. Spiel, Jr.; Richard A. Moore, Jr.; Elizabeth J. Moore, a minor; Matthew S. Moore; Joseph F. Moore; Kate L. Moore; Samuel S. Moore, a minor; Alice S. Reginos; Cynthia Reginos, a minor; Eleanor S. Glass; George B. F. Glass, a minor; and Gustavus F. Swift IV. The income disposition provisions of Taylor trust B differ from those of Taylor trust A in that income beneficiaries of Taylor trust B must exercise a power of withdrawal before income payments are made and any income not distributed is accumulated and added to the trust's principal. In all other respects, the income dispo-

sition provisions of the two trusts are virtually identical. When each trust terminates, the principal of each trust is to be distributed to the beneficiaries then entitled to income in the same proportion as that in which income would be distributable.

In 1974, Harris filed a complaint for instructions as to the proper interpretation of certain provisions, including a tax apportionment clause, of the trust agreement creating Taylor trust A. In the same complaint, the successor trustees of Taylor trust B petitioned for instructions as to the proper interpretation of certain provisions, including a spendthrift clause and a tax apportionment clause, in the trust agreement creating Taylor [*352] trust B. After the settlor and the other adult defendants filed separate answers to this complaint, the court appointed guardians ad litem for all minor defendants.

[**352] [***191] Prior to the filing of this complaint, Mrs. Taylor had informed the successor trustees of Taylor trust B of her intention to relinquish all of her retained interests, rights, powers and privileges in and with respect to Taylor trust B. The successor trustees of Taylor trust B questioned whether such a voluntary alienation was possible in light of the terms of the trust's spendthrift clause. After the guardians filed separate answers to the aforementioned complaint, the court found that such an alienation was possible in an order disposing of this question only. Thereafter, Mrs. Taylor executed a release, renunciation and relinquishment of all rights, titles and interests in and with respect to that trust.

After Mrs. Taylor executed this release, plaintiffs and all adult defendants including the settlor filed a motion for judgment on the pleadings. Memoranda of law were filed by the various parties including one of the guardians and the settlor's siblings thereafter petitioned for entry of a supplementary decree adjudging that the court's rulings are equally applicable and binding in respect to six other trusts they created. In their petition the siblings stated that Marie S. Spiel executed a trust agreement on December 30, 1933, which is identical to the trust agreement executed the same day by Mrs. Taylor, and thereby created an A trust which is identical to Taylor trust A. The petition further stated: (1) that Jane S. Moore executed a trust agreement on December 23, 1938, which is substantially identical to the trust agreement creating Taylor trust A, and thereby created a trust (hereinafter Moore trust A) which is substantially identical to Taylor trust A; (2) that Gustavus F. Swift, Jr., executed a trust agreement that same day which is identical to the one executed by Jane S. Moore, and thereby created an A trust which is identical to Moore trust A; and (3) that on December 27, 1938, each of the three siblings executed a trust agreement identical to the one executed that day by Mrs. Taylor, and thereby created trusts (hereinafter respectively Spiel trust B, Moore trust B and Swift trust B) identical to Taylor trust B. The siblings then requested instructions as to the proper interpretation of those provisions of the trust agreements they executed having Taylor trust counterparts which the court had been asked to construe. One of these provisions is the tax apportionment clause of the trust agreements executed by the siblings.

In response to the foregoing, the court entered an order in which it concluded that all eight trusts contained the following tax apportionment provision:

If any estate, inheritance or other succession taxes or duties or

[*353] transfer charges are assessed in connection with any distribution of income or principal hereunder, they shall be paid by the trustee or successor trustee out of the principal of the trust estate.

The court went on to find as a matter of law that upon the death of a settlor, if trust assets are included in his gross estate for estate or inheritance tax purposes, then there should be apportionment of such taxes and the trust is obligated to pay its proportionate share out of the principal of the trust estate. The court also found as a matter of law that such apportionment between nonprobate or trust assets taxed in the settlor's estate and the settlor's probate assets is fair, equitable and called for by the settlor's express language. The court concluded that the apportionment of taxes between the trusts and the estates of the settlors should be on the basis of the value of the trust assets included in the taxable estates compared to the value of all assets included in the taxable estates. The court additionally concluded that Mrs. Taylor's execution of a release, renunciation and relinquishment of all rights, titles and interests in and with respect to Taylor trust B nullified any right Mrs. Taylor had under the tax apportionment clause of that trust. The court then instructed the trustees of the four A trusts and of Spiel trust B, Moore trust B and Swift trust B that: (1) if any trust assets are included in a settlor's gross estate for estate or inheritance tax purposes upon the death of a settlor of any of these seven trusts, the estate of the deceased settlor has the right to require the [**353] [***192] trust to contribute its proportionate share of the estate or inheritance taxes providing such right was not released or relinquished by the settlor; (2) the amount of the contribution by the trust shall be determined on the basis of the value of the trust assets included in the gross estate compared to the value of the total gross estate; and (3) the tax contribution is payable out of principal and not out of income. The court reserved jurisdiction over the remaining issues and directed the guardians to appeal from this order. This appeal followed.Opinion

The guardians ad litem urge that the tax apportionment provision in question neither authorizes nor requires payment of a proportionate share of estate or inheritance taxes upon inclusion of trust assets in the settlor's gross estate. In support of this contention they offer three arguments which merit discussion. The first begins with the assertion that the trust instruments were drawn by experienced counsel and the observation that the settlor's death taxes are not expressly referred to in the tax apportionment clause in question. The guardians submit that if it had been the settlor's intent to have the trust pay such taxes, the draftsman would have been instructed to expressly state that the settlor's death taxes were chargeable to the trust and, if so instructed, the draftsman would [*354] have so stated. The guardians conclude that the absence of such an express direction clearly indicates that the settlor never instructed the draftsman to provide for payment of such taxes out of trust funds and clearly indicates a lack of intent to have such a payment made. Evidently the guardians failed to perceive that the tax apportionment clause in question also does not expressly refer to beneficiaries' death taxes. If the absence of an express direction to pay the settlor's death taxes indicates a lack of intent to have such a payment made, then it follows that the lack of an express direction to pay beneficiaries' death taxes indicates a lack of intent to have the trust pay the beneficiaries' death taxes. Taking the guardians' position and its logical extension together, it follows that the tax apportionment clause in question is a nullity and indicates a lack of intent to have the trust pay any death taxes. We believe that the very presence of the tax provision indicates an intention to have the trust pay some death taxes on some occasion. Since the guardians' position leads to the opposite conclusion, we find it unpersuasive.

The guardians' second argument pertains to the word if at the beginning of the tax apportionment clause in question. They point out that if indicates uncertainty and that there is no uncertainty regarding death and payment of death taxes by the settlor's estate. They argue that the draftsman knew that the settlor must eventually die and that estate taxes would thereafter have to be paid by settlor's estate, and since the taxes referred to following the preposition 'if' make no reference to the settlor's death taxes or the settlor's death, it follows ineluctably that only beneficiaries' death taxes are included among those referred to in the tax apportionment clause in question. We disagree. If the draftsman is chargeable with the knowledge that the settlor must eventually die, then he is equally chargeable with knowledge that the beneficiaries must eventually die. Despite the certainty of both the settlor's eventual death and the eventual demise of all beneficiaries, neither the settlor nor the beneficiaries are expressly referred to in the tax provision. It follows ineluctably that the tax provision refers to neither the settlor's nor the beneficiaries' death taxes. If the provision refers to neither the settlor's nor the beneficiaries' death taxes, then it is a nullity. If the provision is a nullity, then why do we find it in the trust instrument? Would an experienced draftsman draft a null and void tax apportionment provision? We think not. Moreover, as used in the provision in question, if is a subordinating conjunction which introduces a subjunctive clause and means in the event that. (Webster's Third New International Dictionary 1124 (unabr. ed. 1976); The American Heritage [**354] [***193] Dictionary 654 (1970).) So used, the uncertainty if indicates pertains to the occurrence of the assessment mentioned in the following subjunctive clause. As used in this subjunctive clause, the any which follows if is an adjective [*355] which modifies estate taxes, inheritance taxes, other succession taxes, duties and transfer charges which are assessed in the manner described by the remainder of the clause. The guardians' second argument fails to persuade us that this use of any does not bring the settlor's death taxes within the parameters of the tax provision in question.

The guardians' third argument pertains to the last portion of the subjunctive clause in the tax apportionment provision. The guardians argue that since the settlor's right to income terminates upon death and since the settlor retains no right to receive any principal, upon settlor's death there is no distribution of income or principal under the trust which would cause a death tax assessment, therefore only successor beneficiaries can be covered by: assessed in connection with any distribution of income or principal hereunder. We disagree. Not only the settlor's income interest, but also all successor income beneficiaries' income interests appear to terminate upon their respective deaths. Following the guardians' reasoning, it would seem that only holders of principal interests can be covered by this passage. If this was the settlor's intention, then why does the term income appear in this passage? We believe that this argument, like its predecessors, proves too much. One of its other flaws is that it overlooks the redistribution of income interest upon settlor's death. Furthermore, a court's first concern in the construction of a trust is to ascertain the intent of its creator and give effect to that intent if it does not conflict with the law or public policy of the State. (See 2416 *Corp. v. First National Bank (1976), 64 Ill. 2d 364, at 371-72, 356 N.E.2d 20.)* This intent must be gathered from the entire instrument evidencing the trust and if the language used therein, in its ordinary sense, is plain and its meaning is clear, and if the settlor's actual intent can be ascertained therefrom without

reference to rules of construction which are used to affix a presumed intent, we must construe the trust so as to give effect to the actual intent expressed by the trust instrument's language. (See 2416 Corp. v. First National Bank; *Storkan v. Ziska (1950), 406 Ill. 259, 263-64, 94 N.E.2d 185; Continental Illinois National Bank & Trust Co. v. Griffin (1970), 124 Ill. App. 2d 334, 337, 260 N.E.2d 281.)* We believe that the language used in the tax apportionment provision in question, taken in its ordinary sense, is clear and unambiguous and that the settlor's intent can be ascertained therefrom without reference to rules of construction. We further believe that the court below correctly interpreted this language. There is more than one way to express an intention to have death tax burdens apportioned (compare *Lipic v. Wheeler (1951), 362 Mo. 499, 242 S.W.2d 43,* with *Union Trust Co. v. Watson (1949), 76 R.I. 223, 68 A.2d 916),* and this language expresses such an intention on its face.

The other contentions submitted by the guardians involve either rules [*356] of construction used to affix presumed intention in the absence of an expression of actual intention, or rules of law which operate in the same context such as the doctrine of equitable apportionment discussed in *In re Estate of Van Duser (1974), 19 Ill. App. 3d 1022, 313 N.E.2d 228,* and *In re Estate of Phillips (1971), 1 Ill. App. 3d 813, 275 N.E.2d 685.* Our conclusions render these contentions inapposite. Accordingly, the judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

LORENZ and MEJDA, JJ., concur.

the imposition of use taxes under the Code, as the Controller and the district court concluded.

The judgment of the Court of Appeals is reversed.

ERICKSON, J., dissents.

Justice ERICKSON dissenting:

I would affirm the court of appeals. *Investment Hotel Properties, Ltd. v. City of Colorado Springs*, 781 P.2d 113 (Colo.App. 1989). The court of appeals, in my view, properly concluded that Investment Properties' purchase of tangible personal property for the exclusive purpose of furnishing private guest rooms in a hotel owned and operated by Investment Properties was not taxable under the Colorado Springs Sales and Use Tax Ordinance. City Code § 7-2-101 to -1302. The issue in this case is whether property purchased at wholesale and used to furnish hotel guest rooms is exempt from use tax under the purchase for taxable resale exception.

I

The Colorado Springs city code declares that

> every person who stores, uses, distributes or consumes in the City any article of tangible personal property, or taxable services purchased, leased or rented *at retail*, as herein defined, is exercising a taxable privilege.

City Code § 7-2-102(A) (emphasis added). The city may therefore levy a use tax on "the privilege of using, storing, distributing or otherwise consuming tangible personal property and taxable services in the City...." City Code § 7-2-103(B).

The authority to impose a use tax is dependent on the threshold question whether the item of personal property is purchased at retail. If the item of personal property is not purchased at retail, then Colorado Springs does not have the authority to impose a use tax regardless of the extent of use, storage, or distribution of that property.

The city defines "retail sale" or "purchased at retail" as: "Any sale, purchase, lease, *rental* or grant of license to use tangible personal property, or taxable services within the City except a *wholesale sale or purchase for taxable resale.*" City Code § 7-2-104 (emphasis added). The code then defines wholesale sale as:

> A sale by wholesalers or retailers to retail merchants, jobbers, dealers, vendors or other *wholesalers for taxable resale.* It does not include a sale by a wholesaler or retailer to users, consumers, purchasers or customers not for taxable resale, which sales shall be deemed retail sales and subject to the provisions of this Article.

City Code § 7-2-104 (emphasis added).

Under the code, if an item of tangible personal property is purchased for the purpose of taxable resale, then it is a wholesale purchase and not subject to the use tax. Although the code does not specifically articulate a definition of taxable resale, the provisions of the code provide ample guidance regarding the legislative intent of the city.

A "sale" is defined by City Code § 7-2-104 to include all sales, leases and, *rentals* of personal property. A resale would therefore occur when the purchaser of the property sells, leases, or rents that property to another party or individual. City Code § 7-2-310 provides that the furnishing of tangible personal property is a taxable event,[1] and City Code § 7-2-311 provides that the furnishing of rooms in a hotel is also a taxable event.[2] The rental of a room and accompanying personal property is thus a taxable resale. Because Investment Properties purchased the personal property for taxable resale, Colorado Springs does not have authority under the code to impose a use tax upon that property.

II

The imposition of a use tax on the purchase of hotel room furnishings in addition to the imposition of a sales tax when a furnished room is rented is inapposite to both the code, and Colorado case law.

City Code § 7-2-103(C)(2) provides:

> The sales tax and use tax complement each other in the City revenue plan, and together provide a *uniform tax* of two and one-half percent (2½%) upon *either* the sale, purchase, use, storage, distribution or consumption of all tangible personal property and specific taxable services purchased, leased or rented at retail, as herein defined.

(Emphasis added.) The purpose of a use tax is to supplement the sales tax, and therefore should not apply to property subject to sales tax. *State Dep't of Rev. v. Adolph Coors Co.*, 724 P.2d 1341, 1344 (Colo.1986). The imposition of a use tax on personal property purchased to furnish a private guest room, in addition to a sales tax on the rental of that room is, therefore, improper as double taxation. *See IBM v. Charnes*, 198 Colo. 374, 376, 601 P.2d 622, 625 (1979) (exemption of intermediate sales from use tax is designed to avoid multiple taxation, the goal being to impose the sales or use tax on the final consumptive transaction).

III

The majority applies the primary purpose test and accompanying factors that were articulated in *Regional Transportation District v. Martin Marietta Corp.*, 805 P.2d 1102 (Colo.1991), and *A.B. Hirschfeld Press, Inc. v. City and County of Denver*, 806 P.2d 917 (Colo.1991). This court need not apply the four-factor analysis since the primary purpose of Investment Properties' purchase is clear.

According to the majority, a purchase is a purchase for resale, and not a taxable purchase at retail, if the primary purpose of the transaction is the acquisition of tangible personal property for resale in an unaltered and basically unused condition. Investment Properties purchased the personal property at issue for no other reason than to furnish private guest rooms, which it intended to rent (resell) to its patrons. The personal property was then rented to Investment Properties' patrons in an unaltered and unused condition.

Thus, even applying the primary purpose test, I would hold that the personal property purchased by Investment Properties for the purpose of furnishing private guest rooms should not be subject to a use tax by the City of Colorado Springs.

1. The sales or use tax is imposed on the purchase price paid or charged or for any consideration for the furnishing of tangible personal property, together with the services of an operator thereof, for any person, shall be taxable hereunder as a rental of such personal property, irrespective of the fact that during all times that the said property is so furnished, the control of the operation of the same remains in the person so providing the said property.
City Code § 7-2-310.

2. The sales or use tax is imposed on the entire price paid or charged on the transaction of furnishing rooms or other accommodations to any person who for a consideration uses, possesses or has the right to use or possess, any room or rooms in any hotel, apartment hotel, guest house, guest ranch, motel, mobile home, auto camp, trailer court or park, under any concession, permit right or access, license to use or other agreement, or otherwise.
City Code § 7-2-311.

Jon Chris JENSEN and Robert Roome, Plaintiffs–Appellants,

v.

The CITY AND COUNTY OF DENVER, a municipal corporation; The City Council, City and County of Denver, and all members thereof; Federico Peña, Mayor of the City and County of Denver Colfax on the Hill Business Improvement District, and Marty Amble, the Executive Director thereof; The Board of Directors of Colfax on the Hill Business Improvement District, and Jack Robinson, Tom Manley, James Beatty Joseph Figueroa, and David Atkinson the Directors thereof; and The State of Colorado, Defendants–Appellees.

No. 90SA51.

Supreme Court of Colorado,
En Banc.

Feb. 25, 1991.

Appeal was taken from an order of the District Court for the City and County of

Denver, Edward E. Carelli, J., which rejected challenge to creation of business improvement district. The Supreme Court, Mullarkey, J., held that: (1) Business Improvement District Act did not violate uniformity clause of Colorado Constitution, and (2) city council substantially complied with statutory requirements in creating proposed district.

Affirmed.

1. Taxation ⇐42(1)

That taxing provisions of Business Improvement District Act exempted apartment rental properties and boarding and rooming houses used on long-term basis from property tax imposed on commercial property did not violate uniformity clause of Colorado Constitution. West's C.R.S.A. §§ 31-25-1213 to 31-25-1218; West's C.R.S.A. Const. Art. 10, § 3(1)(a).

2. Taxation ⇐42(1)

Uniformity clause of Colorado Constitution applies only to ad valorem taxes and requires burden of such taxation to be uniform on same class of property within jurisdiction of authority levying tax. West's C.R.S.A. Const. Art. 10, § 3.

3. Taxation ⇐42(1)

Uniformity of taxation is required within class, not between or among different classes. West's C.R.S.A. Const. Art. 10, § 3.

4. Evidence ⇐83(1)

Presumption of validity and regularity supported official acts of public officials and, in absence of clear contrary evidence, court would presume that they had properly discharged their official duties.

5. Municipal Corporations ⇐450(4)

City council, when verifying signatures of property owners petitioning for formation of business improvement district, was not required to verify property ownership as of date of hearing on creation of district. West's C.R.S.A. § 31-25-1207.

6. Municipal Corporations ⇐450(4)

Validity of petitions requesting formation of business improvement district was not dependent upon presence of operating plan and budget and, thus, subsequent submission of amended operating plan and budget did not invalidate petitions that had been circulated with different operating plan and budget attached. West's C.R.S.A. § 31-25-1211.

Nancy P. Bigbee and Sally S. Townshend, Denver, for plaintiffs-appellants.

Patricia L. Wells, Denver City Atty., John L. Stoffel, Jr., Asst. City Atty., Denver, for defendants-appellees City and County of Denver, The City Council, City and County of Denver, and all members thereof, and Federico Peña, Mayor of the City and County of Denver.

Susan E. Burch, Denver, for defendants-appellees Colfax on the Hill Business Improvement Dist., Amble, and the Bd. of Directors of Colfax on the Hill Business Improvement Dist.

Justice MULLARKEY delivered the Opinion of the Court.

This is an appeal [1] from a Denver District Court decision holding that the Denver City Council did not abuse its discretion or exceed its jurisdiction when it created the Colfax on the Hill Business Improvement District pursuant to the Business Improvement District Act, §§ 31-25-1201 to -1228, 12B C.R.S. (1990 Supp.) (the "BID Act"). In reaching its decision, the district court held that the BID Act did not violate the Uniformity Clause of the Colorado Constitution, Article X, Section 3(1)(a). We affirm on both issues.

1. This court has jurisdiction because this case is an appeal from the final judgment of a district court in which one issue involves the constitutionality of a statute. *See* § 13-4-102(1)(b), 6A C.R.S. (1987).

I.

In 1988, the legislature enacted the BID Act which allows municipalities to create Business Improvement Districts (BIDs) within their boundaries. Under section 31-25-1205, a municipality may form a BID if it receives a petition signed by persons who own real or personal property equal to at least fifty percent of both the assessed valuation of the service area and the total acreage in the proposed district.[2] The "service area," defined in section 31-25-1203(10), is the area within the boundaries of the district. The district consists of all commercial property located in the service area and includes property in the service area which later is changed from residential or agricultural property to commercial property. *Id.* Pursuant to section 31-25-1213, the BID may raise revenue by levying an *ad valorem* tax upon all commercial property in the district. The parties stipulated that residential property, including single family residence, boarding/rooming houses and apartment rental properties are not taxed under the BID Act. *See* § 31-25-1203(10) (residential property within service area may not be taxed).

In March 1989, the BID organizers filed petitions with the City and County of Denver seeking the creation of the Colfax on the Hill BID.[3] Although not required by the BID Act, the petitioners attached copies of a proposed operating plan with specified tax rate and budget. The plaintiffs (collectively referred to as "Jensen") are owners of commercial property located within the boundaries of the BID who oppose the creation of the proposed district.

Following the issuance of a public notice, the Denver City Council held a public hearing on June 19, 1989 pursuant to section 31-25-1206 of the BID Act. At the hearing, Jensen submitted petitions in opposition to the proposed district and alleged that the petitions submitted in favor of the proposed district should be dismissed because the petitions were deficient. Among the deficiencies Jensen alleged were that: (1) certain property owners who had signed the petition had since sold their property, (2) certain property owners who originally signed the petition in favor of the proposed district later signed a petition against the proposed district, (3) the verification of property ownership was not current as of the date of the hearing, and (4) the proponents submitted an amended version of the operating plan and budget at the hearing that contained different terms from the operating plan and budget attached to the petition. The City Council subsequently postponed voting on the proposed district until June 26, 1989 so that the administration (i.e., the City Attorney's office and the Department of Public Works) could investigate the protests.

In the ensuing investigation, the city administration determined that some of the signatures supporting creation of the BID were indeed not valid because the signatories either no longer owned property in the BID or had signed a later petition opposing the proposed BID. The administration then recomputed the relevant percentages and reported to the City Council that creation of the BID was supported by the owners of 52.76% of the total assessed valuation in the service area and 52.361% of the total acreage in the district. In verifying that the signatures belonged to property owners within the service area, the administration used information that was current as of March 1989. The administration's report also concluded that the BID organizers were authorized by virtue of the petition to submit the amended operating plan and budget at the hearing.

2. Section 31-25-1205 contains additional requirements that are not at issue in this case.

3. The service area boundaries are Sixteenth Avenue on the north, the alley east of Josephine Street on the east, Fourteenth Avenue on the south, and Grant Street (south of Colfax Avenue) and the alley between Sherman and Grant Streets (north of Colfax Avenue) on the west.

On June 26, 1989, after receiving the administration's report, the City Council enacted an ordinance creating the proposed BID and adopting the amended operating plan and budget. Subsequently Jensen filed a complaint requesting judicial review of the City Council's action pursuant to C.R.C.P. 106(a)(4), declaratory relief pursuant to C.R.C.P. 57 and injunctive relief under 42 U.S.C. § 1983. The district court held that the City Council acted within its discretion and jurisdiction in creating the district. It also held that the BID Act did not violate Article X, Section 3(1)(a), of the Colorado Constitution. Jensen now brings this appeal.

II.

[1] We address first Jensen's claim that the BID Act's taxing provisions, sections 31-25-1213 to -1218, violate Article X, Section 3(1)(a), of the Colorado Constitution. At the outset, we note that statutes are presumed to be constitutional and that Jensen, as the moving party, must establish that the BID Act is unconstitutional beyond a reasonable doubt. *See Colorado Dep't of Social Serv. v. Board of County Comm'rs*, 697 P.2d 1, 10 (Colo.1985).

[2] Article X, Section 3(1)(a), the Uniformity Clause, states:

> Each property tax levy shall be uniform upon all real and personal property not exempt from taxation under this article located within the territorial limits of the authority levying the tax.

As we have noted in the past, this section applies only to *ad valorem* taxes and requires the "burden of such taxation to be uniform on the same class of property within the jurisdiction of the authority levying the tax." *Colorado Dep't of Social Serv. v. Board of County Comm'rs*, 697 P.2d at 11.[4]

Under section 31-25-1213 of the challenged BID Act, the BID "has the power to levy and collect *ad valorem* taxes on and against all taxable commercial property, as defined in section 31-25-1203(2), within the boundaries of the district." By defining "commercial property" in section 31-25-1203(2) as "any taxable real or personal property which is not classified for property tax purposes as either residential or agricultural," the BID Act incorporates the definitions already used in the general tax statutes. *See* § 39-1-102(5.5), (14.3), (14.4), (14.5), 16B C.R.S. (1990 Supp.). These definitions correspond to Article X, Section 3(1)(b) of the Colorado Constitution which has defined the classification "residential real property" since the section was amended in 1982 as "all residential dwelling units and the land, as defined by law, on which such units are located, and mobile home parks, but shall not include hotels and motels...."

Jensen claims that the BID Act, insofar as it exempts apartment rental properties and boarding/rooming houses used on a long-term basis, violates the Uniformity Clause. Jensen asserts that these properties benefit from the improvements funded by the BID Act and thus properly should be taxed as commercial property. Since such properties are treated as residential under the BID Act, Jensen concludes that the tax classification adopted by the legislature results in unequal treatment of two types of property belonging in the same classification. We do not agree.

[3] We have construed Article X, Section 3, to allow the legislature to make reasonable classifications for tax purposes. *See Senior Corp. v. Board of Assessment Appeals*, 702 P.2d 732, 738 (Colo.1985); *American Mobile Home Ass'n, Inc. v. Dolan*, 191 Colo. 433, 438, 553 P.2d 758, 762 (1976); *District 50 Metro. Recreation Dist. v. Burnside*, 167 Colo. 425, 431, 448 P.2d 788, 790-91 (1968). Uniformity of taxation is required within a class, not between or among different classes.

In this instance, the legislature enacted the BID Act primarily to "promote the continued vitality of commercial business areas within municipalities." § 31-25-1202(1). To achieve this aim, the legislature provided that a BID would have the power to impose an *ad valorem* tax on "commercial property" rather than on "residential property." Incorporated into the BID Act are the definitions of residential property from the general property tax definitions that correspond to the definition of residential property contained in Article X, Section 3(1)(b). By this constitutional provision, hotels and motels are excluded from the residential property. "Hotels and motels" are defined to include lodging which is "predominantly used on an overnight or weekly basis." § 39-1-102(5.5), 16B C.R.S. (1990 Supp.). Apartments and boarding/rooming houses used on a long term basis do not come within the definitions of hotel and motel and properly are included within the definition of residential property.

The distinction that Jensen attacks thus has its origins in Article X, Section 3(1)(b), which is a companion constitutional provision to the Uniformity Clause; it directly follows and modifies subsection (1)(a), the subsection containing the Uniformity Clause. Both provisions were adopted by the voters in the 1982 general election. H.R.J. Res. 1005, 54th Leg., 1983 Colo.Sess. Laws 1675, 1682. Clearly then, a classification based on Article X, Section 3(1)(b), is reasonable and does not violate the Uniformity Clause found in the exact same section. Moreover, we do not view the legislature's adoption of the classification as unreasonable given the purpose of the BID Act. Accordingly, Jensen has failed to prove that the BID Act is unconstitutional beyond a reasonable doubt and we affirm the trial court ruling.[5]

III.

[4] We now address Jensen's second claim challenging the trial court's decision that the Denver City Council substantially complied with the statutory requirements in creating the proposed BID. Jensen brings this action under C.R.C.P. 106(a)(4).[6] The standard of review under this provision is whether the government body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion. We have construed this rule to mean that the district court should affirm the governing body where there is "any competent evidence" to support its decision. *See Bauer v. City of Wheat Ridge*, 182 Colo. 324, 327, 513 P.2d 203, 204-205 (1973).

To determine whether the City Council abused its discretion or exceeded its jurisdiction, we must examine the dictates of the BID Act. Section 31-25-1207 outlines the procedure that the City Council must follow. First, on the date of the hearing, the City Council "shall ascertain, from the tax rolls of the county or counties in which the district is located, the total valuation for assessment of the taxable real and personal property in the service area and the classification of taxable property." Second, "[i]f it appears that said petition is not signed in conformity with this part 12, the governing body shall dismiss the petition...." If, however, "it appears that an organization petition has been duly signed and presented in conformity with this part 12 and that the allegations of the organization petition are true, the governing body

4. In 1982, Article X, Section 3 was amended to change the way actual value of property is determined in order to achieve uniformity in property tax determination for the different classes of taxable property. The new amendment provided that the valuation for assessment of residential real property would be set at a lower percentage than other taxable property. *See Legislative Council of Colorado, An Analysis of 1982 Ballot Proposals*, Research Publ. No. 269, 1-9 (1982).

5. We need not reach Jensen's third claim for injunctive relief under 42 U.S.C. § 1983 since we find the BID Act to be constitutional.

6. C.R.C.P. 106(a), 7A C.R.S. (1990), provides in relevant part: "In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure: (4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law: (I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer."

... may, in its sole discretion, declare the district organized,...."

Section 31–25–1205 sets out the requirements with which the organizers must comply when submitting the petitions. Jensen contends that the City Council did not properly determine that the requirement found in subsection (2) was followed. This section provides:

> The petition shall be signed by persons who own real or personal property in the service area of the proposed district having a valuation for assessment of not less than fifty percent, or such greater amount as the governing body may provide by ordinance, of the valuation for assessment of all real and personal property in the service area of the proposed district and who own at least fifty percent, or such greater amount as the governing body may provide by ordinance, of the acreage in the proposed district.

§ 31–25–1205(2). The record indicates that, prior to the hearing, the city administration verified that the BID petitions were signed by property owners of at least fifty percent of the assessed valuation of real and personal property in the service area and fifty percent of the total acreage in the proposed district as of March 1989. As discussed above, Jensen challenged the city administration's calculations and the City Council postponed consideration of the BID petitions until the alleged deficiencies could be investigated. Once the investigation showed that some of the signatures supporting the creation of the proposed district were invalid, the city administration recalculated the relevant percentages to reflect the lower representation.

Even after the recalculations, however, the signatures still represented more than fifty percent of the assessed valuation in the service area of the proposed district and total acreage of the district. Absent further evidence that the petitions were deficient, we must presume that the City Council properly made its determination that the signatures represented the requisite amount of property owners. A "presumption of [validity and] regularity supports the official acts of public officials and in absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14–15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926); *City of Colorado Springs v. District Court*, 184 Colo. 177, 181, 519 P.2d 325, 327 (1974). Thus, once the City Council adopted the administration's revised percentage determinations made in response to protests raised at the hearing, we find that the City Council complied with the statute.

[5] Jensen argues, however, that the City Council misinterpreted the requirements of section 31–25–1207 of the BID Act when it verified the signatures. He construes this provision to require the City Council to determine the percentage of property owners represented with respect to value and acreage as of the date of the hearing. He asserts that because the information used to verify the property ownership was current as of March 1989 instead of June 26, 1989, the date of the hearing, the petition was deficient and should have been dismissed. Jensen's argument must fail.

Section 31–25–1207(1) specifically states that the total valuation for assessment and the classification of taxable property shall be ascertained from the tax rolls of the county. Because the tax rolls are prepared yearly by the assessor,[7] it is evident that the legislature did not contemplate the time-consuming and costly up-to-the-minute title searches that would be required by Jensen's theory. Due to the date when the hearing occurred, the tax rolls last certified would have been current up to mid–1988. Since the Denver City Council used data current as of March 1989, it more than satisfied the property ownership verification requirements.

[6] Last, we address Jensen's claim that the subsequent submission of the amended operating plan and budget invalidated the petitions since the petitions had been circulated with a different operating plan and budget attached. Jensen does not contend that the amendments were substantial or that those who signed the petition were misled because of the changes later made.[8]

Section 31–25–1211 provides, "No district created under the provisions of this part 12 shall issue bonds, levy taxes, fees, or assessments, or provide improvements or services unless a municipality has approved an operating plan and budget for the district." There is no requirement in the statute that the operating plan and budget be circulated with the petition. Although the record indicates that prior to filing the petition, the organizers may submit the operating plan and budget for approval by the City Planning Office, they are not required to do so. This practice is designed to insure against delays later in the organizing process. Furthermore, section 31–25–1205(2)(d) makes explicit that the organizers listed on the petition have "the power to enter into agreements relating to the organization of the district" which indicates that they are authorized to change the operating plan and budget. Thus, it is apparent that the validity of the petitions is not dependent upon the presence of an operating plan and budget.

Accordingly, we agree with the trial court's determination that the City Council complied with the statute[9] and neither abused its discretion nor exceeded its jurisdiction when it declared the proposed district organized.

Judgment affirmed.

7. Section 39–5–123(1), 16B C.R.S. (1990 Supp.), provides: "[T]he assessor shall complete the assessment roll of all taxable property within his county, and no later than August 25 in each year he shall prepare therefrom two copies of the abstract of assessment, and in person, and not by deputy, shall subscribe his name, under oath, to the following statement, which shall be a part of such abstract: 'I, _____, the assessor of _____ county, Colorado, do solemnly swear that in the assessment roll of such county I have listed and valued all taxable property located therein and that such property has been assessed for the current year in the manner prescribed by law and that the foregoing abstract of assessment is a true and correct compilation of each schedule.'"

8. The amended plan was the same as the operating plan and budget circulated with the petitions except for three changes. The mill levy was raised from 5.77 to 5.8 mills in response to a decrease in the total valuation of commercial-use property in the district. Two restrictive provisions, a $175,000 per year budget cap and a three-year sunset provision for the new district, were added in response to comments from property owners who had signed the petitions.

9. The trial court properly did not make any determination regarding the genuineness of the signatures since section 31–25–1207(2) provides that, "[T]he findings of the governing body upon the question of the genuineness of the signatures and all matters of fact incident to such determination shall be final and conclusive." *See People ex rel. Setters v. Lee*, 72 Colo. 598, 604, 213 P. 583, 587 (1923); *Kaiser v. City of Lakewood*, 33 Colo.App. 239, 244, 517 P.2d 471, 474 (1973).

Sherry Denise MARTIN, Petitioner,

v.

The PEOPLE of the State of Colorado, Respondent.

No. 90SC747.

Supreme Court of Colorado,
En Banc.

March 11, 1991.

Certiorari to the Colorado Court of Appeals, 88CA1130, Pitkin County District Court, 88CR5.

David F. Vela, Colorado State Public Defender, Jaydee K. Bachman, Deputy State Public Defender, Greeley, for petitioner.

Gale A. Norton, Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Robert M. Russel, First Asst. Atty. Gen., Denver, for respondent.

Prior report: Colo.App., 806 P.2d 393.

ORDER OF COURT AND MANDATE

Upon consideration of the Record on Appeal, together with briefs filed herein,

SANDERS BRINE SHRIMP, Petitioner,

v.

AUDIT DIVISION OF the UTAH STATE TAX COMMISSION, Respondent.

No. 910106.

Supreme Court of Utah.

Jan. 28, 1993.

State Tax Commission held that brine shrimp cyst operator did not qualify for sales tax exemptions as manufacturer. Taxpayer petitioned for judicial review. In original proceeding, the Supreme Court, Zimmerman, J., held that: (1) administrative rule improperly restricted definition of manufacturer and was invalid, and (2) express finding was required on whether operator complied with requirements for exemption permitted by statute.

Reversed and remanded.

1. Taxation ⇐1245

State Tax Commission sales tax exemption rule requiring that manufacturer produce tangible personal property to qualify for exemption as manufacturer was invalid in that rule improperly restricted manufacturing sales tax exemption contained in statute. U.C.A.1953, 59–12–104(16) (1990).

2. Administrative Law and Procedure ⇐386

Administrative agency's rules must be consistent with its governing statutes.

3. Administrative Law and Procedure ⇐386

Administrative rule that is out of harmony with governing statute is invalid.

4. Taxation ⇐1319

Remand to State Tax Commission was required to determine whether brine shrimp cyst operation qualified for sales tax exemption for purchase of harvesting and processing equipment where Commission made no express finding on whether operator's activities were included in statutory code classification system. U.C.A. 1953, 59–12–104(16) (1990).

R. Paul Van Dam, Mark E. Wainwright, Salt Lake City, for Utah State Tax Com'n.

Richard C. Cahoon, Salt Lake City, for Sanders Brine Shrimp.

Kent B. Linebaugh, John N. Brems, Salt Lake City, for amici Water & Power Technology, Inc., and Mount Olympus Waters, Inc.

ZIMMERMAN, Justice:

Sanders Brine Shrimp, a Utah partnership, seeks review of a February 13, 1991, final order of the Utah State Tax Commission. The Commission held that Sanders did not qualify for the sales tax exemptions provided for either manufacturers or farmers under subparts (16) and (22), respectively, of section 59–12–104 of the Code. Utah Code Ann. § 59–12–104(16), (22) (Supp. 1988) (amended 1989, 1991, and 1992).[1] Sanders argues, inter alia, that in ruling that its brine shrimp operation did not qualify as a manufacturer under subpart (16), the Commission relied upon an administrative rule that impermissibly narrowed the availability of the exemptions. We agree and reverse the order of the Commission, but we remand the case for a factual determination regarding Sanders' compliance with the remaining statutory requirements for the sales tax exemption.

Sanders harvests and processes brine shrimp cysts, or eggs, from the Great Salt Lake and sells them as a source of food for tropical fish and prawns. Purchasers hatch the cysts, raise the resulting brine shrimp, and use them as feed. During the audit period (July 1, 1985, to June 30, 1988), Sanders spent $319,260.97 on equipment and machinery to use in harvesting and processing the brine shrimp cysts. Relying on the sales tax exemptions for manufacturers and farmers found in subparts (16) and (22) of section 59–12–104, Sanders did not pay sales tax on these purchases. The equipment and machinery expanded Sanders' production capacity by 1500 percent.

Sanders' operation consists of two phases. First, the brine shrimp cysts are harvested from the Great Salt Lake. Second, the cysts are transported to Sanders' Riverdale facility, where they are processed. Until Sanders processes the brine shrimp cysts, they have little or no commercial value. The harvesting and processing phases are both necessary to Sanders' business, and the new equipment and machinery were purchased for use in both phases.

On March 27, 1989, the Commission's Auditing Division assessed a sales tax deficiency based on Sanders' failure to pay sales tax on the equipment and machinery purchased during the audit period. Sanders petitioned for redetermination.

The Commission held a formal hearing during which evidence was presented. The Commission issued its decision on June 7, 1990, finding that Sanders was neither a manufacturer nor a "farming operation" and therefore did not qualify for either of the claimed sales tax exemptions. The Commission found that Sanders was not a manufacturer because it could not satisfy the criteria set forth in rule R865–85S–1(A)(4). Utah Admin.Code R865–85S–1(A)(4) (1987–88) (recodified as amended Utah Admin.Code R865–19–85S(A)(4) (1992)).[2] Specifically, the Commission determined that Sanders did not satisfy rule R865–85S–1(A)(4)'s requirement that a "manufacturer ... produce[ ] a new, reconditioned, or remanufactured product, article, substance or commodity from raw, semi-finished, or used material." *Id.* R865–85S–1(A)(4)(b).

Sanders filed a request for reconsideration, which the Commission granted. At the Commission's reconsideration hearing, Sanders argued, inter alia, that rule R865–85S–1(A)(4) impermissibly narrowed the availability of the manufacturer's exemption in subpart (16) of section 59–12–104. By an order dated February 13, 1991, the Commission rejected Sanders' arguments and affirmed its previous order.

On appeal, the dispositive issue is whether the Commission applied a rule that improperly restricts the statutory definition of "manufacturer."[3] Utah Code Ann. § 59–12–104(16) (Supp.1988) (amended 1989, 1991, and 1992). Questions of statutory construction are matters of law, and we give no deference to an administrative agency's interpretation of a statute absent certain circumstances, none of which exist here. *Chris & Dick's Lumber & Hardware v. Tax Comm'n*, 791 P.2d 511, 513–14 (Utah 1990).

[1] The relevant part of the sales tax exemption statute states:

> The following sales and uses are exempt from the taxes imposed by this chapter:
>
> ....
>
> (16) *sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or*

1. The sales tax exemption statute, section 59–12–104, has been amended several times in the past few years. The subparts cited in the text have been recodified as (15) and (21), respectively, of this statute as they were codified at the end of the auditing period. The relevant subparts of the sales tax exemption statute have remained

2. The version of the relevant administrative rule in place at the end of the auditing period is substantially the same as the current version.

3. Other issues have been briefed and argued by the parties, including whether Sanders' harvesting of brine shrimp cysts constitutes a farming operation under subpart (22) of section 59–12–104. Because the subpart (16) issue is dispositive, we do not address the other issues.

expanding operations (excluding normal operating replacements, which includes replacement machinery and equipment even though they may increase plant production or capacity, as determined by the commission) *in any manufacturing facility in Utah.* Normal operating replacement shall include replacement machinery and equipment which increases plant production or capacity. *Manufacturing facility means an establishment described in SIC Codes 2000 to 3999* of the Standard Industrial Classification Manual 1972, of the federal Executive Office of the President, Office of Management and Budget. For purposes of this subsection, *the commission shall by rule define "new or expanding operations" and "establishment."* ...

Utah Code Ann. § 59–12–104(16) (Supp. 1988) (emphasis added) (amended 1989, 1991, and 1992).

Rule R865–85S–1(A)(4), which was apparently promulgated by the Commission to implement section 59–12–104(16), states:

"Manufacturer" means a person who:

(a) functions within the activities included in SIC code classification 2000–3999;

(b) produces a new, reconditioned, or remanufactured product, article, substance, or commodity from raw, semi-finished, or used material; and

(c) in the normal course of business produces products for sale as tangible personal property.

Utah Admin.Code R865–85S–1(A)(4) (1987–88) (recodified as amended Utah Admin.Code R865–19–85S(A)(4) (1992)). Under this rule, one purchasing equipment for use in any "manufacturing facility" is entitled to the exemption provided in section 59–12–104(16) only if he or she meets the criteria for being a manufacturer set forth in subparts (a), (b), and (c) of the rule. While the requirement in subpart (a) mirrors the statute, i.e., the business must fall within SIC code descriptions, the requirements in subparts (b) and (c) have no statutory counterparts. Nothing in the statute requires the qualifying facility to produce "a new, reconditioned or remanufactured product, article, substance, or commodity" that is for sale "in the normal course of business ... as tangible personal property."

Thus, under the Commission's rule, one might operate a manufacturing facility as defined by the statute and not be a manufacturer as defined by the rule. We find no obvious source for the Commission's narrowing of the exemption's availability. Section 59–12–104(16) authorizes the Commission to define by rule the terms "new or expanding operation" and "establishment." However, it does not authorize the Commission to define the term "manufacturer," nor does it authorize the Commission to otherwise limit the availability of the exemption as it has done in subparts (b) and (c) of rule R865–85S–1(A)(4).

[2, 3] It is a long-standing principle of administrative law that an agency's rules must be consistent with its governing statutes. *See, e.g., Merrill Bean Chevrolet, Inc. v. State Tax Comm'n,* 549 P.2d 443, 445 (Utah 1976); *Robert H. Hinckley, Inc. v. State Tax Comm'n,* 17 Utah 2d 70, 77, 404 P.2d 662, 668 (1965). Thus, a rule that is out of harmony with a governing statute is invalid. *See, e.g., Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue,* 297 U.S. 129, 134, 56 S.Ct. 397, 399, 80 L.Ed. 528 (1936).

For the foregoing reasons, we hold that the Commission's rule defining "manufacturer" is invalid because it improperly restricts the manufacturing sales tax exemption set forth in section 59–12–104(16). Therefore, we reverse the Commission's denial based on noncompliance with its definition of "manufacturer."

[4] Sanders argues that we should order the Commission to grant the exemption. However, the invalidity of the Commission's rule defining "manufacturer" does not necessarily mean Sanders qualifies for the sales tax exemption. Sanders contends that the Commission's order implicitly found that Sanders met all the other criteria required by the rule and statute, specifically that it is in compliance with subpart (a) of the rule, which follows the statute and requires that the petitioner be "function[ing] within the activities included in SIC code classification 2000–3999." We disagree. The Commission made no express finding on whether Sanders complied with the first requirement, dealing with SIC code classifications. Its order suggests that it probably did not reach that issue because there was no reason to do so in light of Sanders' failure to meet the second factor, dealing with new or reconditioned products. We refuse to interpret the lack of a finding of noncompliance as the equivalent of an affirmative finding of compliance. Because the Commission did not resolve whether Sanders complied with the remaining statutory requirements of the sales tax exemption, we remand the case to the Commission for further proceedings.

HALL, C.J., HOWE, Associate C.J., and STEWART and DURHAM, JJ., concur.

Lorrie Ann ARNOLD, Plaintiff and Appellant,

v.

Dr. Glade B. CURTIS, Defendant and Appellee.

No. 910146.

Supreme Court of Utah.

Jan. 29, 1993.

Medical malpractice suit was commenced against obstetrician for failing to diagnose adenocarcinoma of mother's bowel until 35 weeks into pregnancy. The Third District Court, Salt Lake County, Leslie A. Lewis, J., granted obstetrician's motion for summary judgment after refusing to consider affidavit from patient's expert witness. Appeal was taken. The Supreme Court, Howe, Associate C.J., held that: (1) refusing to consider expert affidavit as sanction for failing to timely identify witness was not abuse of discretion, and (2) undisputed evidence that carcinoma could not have been treated earlier mandated finding of no proximate cause.

Affirmed.

1. Pretrial Procedure ⇐753

Refusing to consider expert's affidavit submitted in opposition to motion for summary judgment, on ground that affiant was not identified as possible witness before deadline established in scheduling order, was not abuse of discretion; scheduling order was made with concurrence of both counsel and proponent of affidavit did not request change in trial court's scheduling order or file designation of witnesses. Fed.Rules Civ.Proc.Rule 16, 28 U.S.C.A.

2. Evidence ⇐538

Physicians practicing in one specialty are not ordinarily competent to testify as experts on standard of care applicable in another specialty except when witness is knowledgeable about standard of care of another specialty or when standards of different specialties on issue in particular case are the same.

3. Evidence ⇐571(9)

Uncontradicted expert evidence, that earlier diagnosis of pregnant patient's carcinoma would not have permitted earlier treatment or surgery, in that baby was delivered at earliest time that safe delivery was possible and surgery for carcinoma followed, established that any negligence in obstetrician's failure to earlier diagnose carcinoma was not proximate cause of mother's damage.

SAVAGE INDUSTRIES, INC., Petitioner,

v.

UTAH STATE TAX COMMISSION, Respondent.

No. 900248.

Supreme Court of Utah.

May 3, 1991.

Corporation sought writ of review of final order of State Tax Commission denying petition for redetermination and upholding finding of auditing division that subsidiary corporations were not entitled to carry over their own preacquisition losses in determining their annual income for preparation of consolidated returns of parent. The Supreme Court, Hall, C.J., held that statute prohibiting acquiring corporation from using preacquisition losses of acquired corporation does not prohibit acquired corporation from taking advantage of its loss carryovers incurred prior to date of acquisition in order to offset its own as opposed to acquiring corporation's income; deduction may be taken by acquired corporation, whether filing separately or filing consolidated return as part of affiliated group.

Reversed and remanded.

1. **Administrative Law and Procedure** ⇐759
Statutes ⇐219(1)

Intermediate standard of review is only to be applied in areas of agency technical expertise or in areas where legislature has specifically granted agency discretion in its decision-making process; for most questions of basic statutory interpretation or construction of law, court is as suited to decide issues involved as is agency and therefore will review agency decision for correctness.

2. **Administrative Law and Procedure** ⇐741

Section of Administrative Procedure Act governing review of agency decisions made after formal adjudicative hearing and requiring that "substantial prejudice" be shown before court may grant relief from agency action refers to person seeking review and does not modify actual standards of review nor does it relate to degree of deference court must give agency decision. U.C.A.1953, 63-46b-16(4).

3. **Administrative Law and Procedure** ⇐800
Taxation ⇐493.8

Under the Administrative Procedure Act, state Tax Commission's interpretation of law in denying corporation's petition for redetermination and upholding finding of auditing division that subsidiary corporations were not entitled to carry over their own preacquisition losses in determining their annual income for preparation of consolidated returns of parent corporation would be reviewed using correction of error standard, giving no deference to Commission's interpretation of law. U.C.A. 1953, 59-7-108(14)(f), 63-46b-16(4), (4)(d).

4. **Statutes** ⇐188

Terms of statute should be interpreted in accord with usually accepted meanings.

5. **Statutes** ⇐189

In construing legislative enactments, reviewer assumes that each term in statute was used advisedly; thus statutory words are read literally, unless such reading is unreasonably confused or inoperable.

6. **Taxation** ⇐1041

Statute prohibiting acquiring corporation from using preacquisition losses of acquired corporation does not prohibit acquired corporation from taking advantage of loss carryovers incurred prior to date of acquisition in order to offset its own as opposed to acquiring corporation's income; the deduction may be taken by acquired corporation, whether filing separately or filing consolidated return as part of affiliated group. U.C.A.1953, 59-7-108(14)(f).

7. **Taxation** ⇐1041

For purpose of statute prohibiting acquiring corporation from using preacquisition losses of acquired corporation, filing of consolidated returns by acquiring corporation does not transform deductions by acquired corporations into those of acquiring corporation. U.C.A.1953, 59-7-108(14)(f).

8. **Statutes** ⇐181(1)

Court's primary responsibility in construing legislative enactments is to give effect to legislature's underlying intent.

9. **Statutes** ⇐184

In determining legislative intent of statute, statute should be considered in light of purpose it was designed to serve and so applied as to carry out that purpose if it can be done consistent with its language.

10. **Taxation** ⇐1041

Intent of statute prohibiting acquiring corporation from using acquisition losses of acquired corporation is to prevent buying of loss corporations by high profit corporations solely for use of loss corporation's previous loss carryover deductions; further intent may be to limit use of loss carryover deductions to those corporations which have previously suffered losses and therefore are entitled to average their low income years with their high income years. U.C.A.1953, 59-7-108(14)(f).

11. **Taxation** ⇐1041

Statute prohibiting acquiring corporation from using preacquisition losses of acquired corporation does not, as written, prevent manipulation of corporate assets for purpose of accruing tax deductions based on preacquisition losses. U.C.A. 1953, 59-7-108(14)(f).

R. Brent Jenkins, Dale R. Kent, Salt Lake City, for petitioner.

R. Paul Van Dam and Mark E. Wainwright, Salt Lake City, for respondent.

HALL, Chief Justice:

Savage Industries, Inc., seeks a writ of review of a final order of the Utah State Tax Commission ("the Commission") entered on April 20, 1990, which denied Savage Industries' petition for redetermination and upheld the finding of the auditing division that subsidiary corporations of Savage Industries were not entitled to carry over their own preacquisition losses in determining their annual income for preparation of the consolidated returns of Savage Industries.

The facts in the case have been stipulated to by the parties and are supplemented by findings of the Commission in its redetermination hearing. Prior to April 1, 1982, Kenneth Savage, T. Luke Savage, and Neal Savage owned the majority of the stock of fourteen different operating corporations. On April 1, 1982, a stock holding and management corporation, Savage Western Industries Corporation ("Savage Western"), was formed to consolidate the corporations into a manageable structure. On April 1, 1982, the stock of Savage Western was entirely owned by the three brothers and members of their families. On November 28, 1984, Savage Western underwent a statutory merger with Savage Industries, Inc., and Savage Western changed its name to Savage Industries, Inc. On December 31, 1986, shares of Savage Industries stock were transferred between the brothers to give each brother an equal percentage of ownership after the settlement of divorces.

Prior to April 1, 1982, the stock of KNT Leasing Corporation ("KNT") was owned by the brothers, with each owning 33⅓ percent of the stock. On April 1, 1982, Savage Western acquired 86.7 percent (2,600 shares) of the stock of KNT in exchange for its own stock. The remaining 13.3 percent (400 shares) was retained by Neal Savage pending divorce settlements. Prior to its acquisition by Savage Western, KNT filed separate Utah corporate franchise tax returns. In order to conform its tax year to that of Savage Western, KNT filed a separate corporate franchise tax return for the partial tax year June 1, 1981, to March 31, 1982. The return reported a current year's loss of $74,641 and reported $61,252 of prior years' losses as being available for carryover. On November 15, 1984, the name of KNT was changed to Savage Transportation Corporation. On January 15, 1985, the remaining 400 shares of Savage Transportation were acquired by

Savage Industries On March 30, 1987, Savage Transportation was merged with Savage Industries

Prior to April 1, 1983, the shares of Western Rock Products Corporation ("Western Rock") were owned by Kenneth Savage, T Luke Savage, Charles Blackburn, and Eldon Reese On April 1, 1983, Savage Western acquired the shares of Kenneth Savage and T Luke Savage, for a total of 81 percent ownership of Western Rock During the next two years, the shares owned by Blackburn and Reese were redeemed, giving Savage Western 100 percent ownership in Western Rock For periods of time prior to the April 1, 1983 acquisition by Savage Western, Western Rock filed separate corporate franchise tax returns In order to conform its tax year to that of Savage Western, Western Rock filed a separate corporate franchise tax return for the partial tax year January 1, 1983, to March 31, 1983 The return reported a current year's loss of $648,291 Western Rock's separate return loss was first carried back to prior Western Rock separate returns, where $359,685 (as determined by Commission adjustment) was applied to offset income, thus leaving $288,606 of the loss available to be carried forward

Starting with the fiscal year ending March 31, 1983, Savage Western, and later Savage Industries, joined with its subsidiaries in filing a Utah consolidated corporate franchise tax return [1] In August of 1987, Savage Industries filed amended consolidated franchise tax returns for the years ended March 31, 1983, 1984, 1985, and 1986 to correct errors made on previously filed returns In its amended consolidated return for the fiscal year ending March 31, 1983, Savage Western carried over $26,770 of KNT's separate return loss and applied it to offset KNT's income on the consolidated return In its amended consolidated return for the fiscal year ending March 31, 1985, Savage Industries carried over $290,332 of Western Rock's separate return loss and applied it to offset Western Rock's income on the consolidated return KNT's net operating loss was used to offset income generated by KNT Western Rock's net operating loss was used to offset income generated by Western Rock Neither net operating loss was used to offset the income of any other member of Savage Industries' consolidated group

In November of 1987, the auditing division began examining these amended returns and, in an audit report dated February 2, 1988, disallowed carryovers of the losses on the consolidated returns Savage Industries petitioned the auditing division for a reconsideration of its decision On March 21, 1988, the auditing division responded to Savage Industries' petition and reiterated its position

On April 5, 1988, Savage Industries filed a request for hearing before the Commission in order to orally present arguments prior to the Commission's rendering a final decision on its petition for redetermination Oral argument was made before the Utah State Tax Commission on August 17, 1989 The Commission found in favor of the auditing division and against Savage Industries

I STANDARD OF REVIEW

Our first task in this case is to determine the appropriate standard of review of the Commission's decision The Commission's decision to deny Savage's petition for redetermination was based on its interpretation of Utah Code Ann § 59-7-108 In its conclusions of law, the Commission stated that Savage's interpretation of this section was incorrect and that the plain language of the statute prohibited the deductions sought by Savage The Commission's decision was therefore based purely on its construction and interpretation of the legislative enactment and is purely a question of law

1 Utah Code Ann § 59-7 124 prescribes the requirements for filing a consolidated corporate franchise tax return The ability to file a consolidated return is described in the statute as a privilege of corporations with common stock ownership There is no dispute that Savage Industries and its subsidiary corporations qualified to file consolidated returns under this section

In determining the standard of review of agency decisions, the Utah courts have consistently followed three basic standards of review, which were set forth in the case of *Utah Department of Administrative Services v Public Service Commission* [2] In that case, Justice Oaks, writing for a unanimous court, held that review of administrative decisions fell into three distinct categories which required differing standards of judicial deference to be given to the agency's decision First, agency determinations of basic fact were to be given great weight and would only be overturned if they were not supported by any evidence of substance whatsoever [3] Second, agency determinations of general law, including interpretation of the state and federal constitutions and of acts of Congress and of the Utah Legislature, were to be reviewed giving no deference to the agency's decision, but reviewing it for correctness [4] Third, in between these two standards, agency decisions involving mixed questions of law and fact or the application of specific factual situations to the legislative enactments under which the agency operates were to be given deference by the courts and were to be upheld so long as they fell within the bounds of reasonableness and rationality [5]

Subsequent to *Department of Administrative Services*, a large body of case law has evolved applying and refining the scope of the three standards [6] Review of agency determinations of fact has remained consistent, with courts upholding agency findings of fact if they were based upon any evidence of substance [7] Review of agency determinations of law, however, has been less clear under *Department of Administrative Services* [8] This is especially so in

2. 658 P 2d 601 (Utah 1983)

3 *Id* at 609

4. *Id.* at 608

5 *Id.* at 610
The degree of deference extended to [agency decisions] on these intermediate types of issues has been given various expressions but all are variations of the idea that the [agency] decisions must fall within the limits of reasonableness or rationality As used in this context, the words 'arbitrary and capricious' mean no more than this
Id

6 *See, e.g., Telecommunications v Public Serv Comm'n*, 747 P 2d 1029, 1030 (Utah 1987), *Taylor v Industrial Comm'n of Utah*, 743 P 2d 1183, 1186 (Utah 1987), *True-Flo Mechanical Sys v Board of Review*, 743 P 2d 1161, 1163 (Utah 1987), *Spreader Specialists, Inc v Public Serv Comm'n*, 738 P 2d 1043, 1044 (Utah 1987), *Smith v Board of Review of Indus Comm'n*, 714 P 2d 1154, 1155 (Utah 1986), *Big K Corp v Public Serv Comm'n*, 689 P 2d 1349, 1353 (Utah 1984), *Barney v Department of Employment Sec*, 681 P 2d 1273, 1275 (Utah 1984), *Bennion v Utah State Bd of Oil, Gas & Mining*, 675 P 2d 1135, 1139 (Utah 1983), *Salt Lake City Corp v Confer*, 674 P 2d 632, 636 (Utah 1983) *Young & Sons v Public Serv Comm'n*, 672 P 2d 728, 729 (Utah 1983) The court of appeals has also decided several cases applying the three standards of review of agency determinations *See, e.g., USX Corp v Industrial Comm n* 781 P 2d 883 886 (Utah Ct App 1989) *Olympus Oil Inc v Harrison*, 778 P 2d 1008, 1010 (Utah Ct App 1989), *Capital Gen Corp v Department of Business Regulation*, 777 P 2d 494, 496 (Utah Ct App 1989) *cert denied*, 781 P 2d 878 (1989) *Kline v Utah Dept of Health* 776 P 2d 57 60 (Utah Ct App 1989) *Taylor v Utah State Training School*, 775 P 2d 432 433-34 (Utah Ct App 1989) *Boyd v Department of Employment Sec*, 773 P 2d 398 400 (Utah Ct App 1989) *Smith & Edwards v Industrial Comm n* 770 P 2d 1016 1017 (Utah Ct App 1989) *Sisco Hilte v Industrial Comm n*, 766 P 2d 1089 1091 (Utah Ct App 1988)

7 There has been a trend in recent case law to require factual findings of an agency to be based on substantial evidence *See, e g , Bennett v Industrial Comm n* 726 P 2d 427 429 (Utah 1986), *Big K Corp*, 689 P 2d at 1353 This standard for reviewing agency findings of fact is incorporated into the Utah Administrative Procedure Act, effective January 1 1988 and found at Utah Code Ann § 63-46b-16(4)(g)

8. *Compare Bennett* 726 P 2d at 429 (defining "employee under Utah s workers compensation statute) with *Johnson v Department of Employment Sec* 782 P 2d 965 968 (Utah Ct App 1989) (defining just cause under Utah s unemployment statute) The distinction between these two cases can be clarified by looking at the organic statutes of the agencies involved The statute giving the agency power to determine whether an employee has left employment for just cause for purposes of unemployment compensation gives the agency wide discretion based on equity and good conscience Utah Code Ann § 35-4-5 The statute determining the scope of employment for workers compensation benefits does not give the Industrial Commission such agency discretion Utah Code Ann § 35-1-43(1)(b)

cases distinguishing between agency decisions which were granted deference by the courts and those reviewed for correctness. Recent decisions of this court have addressed this distinction and have clarified which agency decisions are granted deferential review and which fit within the "general law" category, to be reviewed using a correction of error standard.

In *Hurley v. Board of Review of Industrial Commission*,[9] this court attempted to clarify the distinction between cases requiring deference to agency decisions and cases which would be reviewed using a correction of error standard. In distinguishing the two standards, we noted that agency decisions which are granted a more deferential review are often mixed questions of law and fact, which require application of specific technical fact situations to the statutes which an agency is empowered to administer. These are the types of decisions and applications in which the agency's special expertise puts it in a better position than an appellate court to evaluate the circumstances of the case in light of the agency mission. In contrast, decisions involving statutory interpretation, issues of basic legislative intent, or construction of ordinary terms in the organic statute of an agency involve areas in which an appellate court is as well suited to decide the legal questions as is the agency. In cases where the basic question is what does the law require? the standard is a correction of error standard.[10]

In *Chris & Dicks v. Tax Commission*,[11] we reiterated that correction of error is the basic standard of review of agency decisions of law. We stated:

> In the usual case, questions of statutory construction are matters of law for the courts, and we rely on a "correction of error" standard of review, according no deference to the agency's interpretation. There are a limited number of circumstances where the agency's interpretation of a statute or rule may be entitled to some deference, as where construction of the statute should take into account the agency's expertise developed from its practical, firsthand experience with the subject matter.[12]

[1] This language clarifies that the intermediate standard of review is only to be applied in areas of agency technical expertise or in areas where the legislature has specifically granted the agency discretion in its decision-making process. For most questions of basic statutory interpretation or construction of the law, the court is as suited to decide the issues involved as is the agency and therefore will review the agency decision for correctness.[13]

The instant case would clearly fit within the correction of error standard under *Chris & Dicks*, *Hurley*, and their predecessors. The Commission's decision was based upon its interpretation of ordinary statutory terms. Its interpretation was not based upon any technical expertise of the Commission nor upon application of a complex, technical fact situation to the statute. The Commission's decision was merely its interpretation of what the statute prohibits. The decision is therefore one which this court is as competent as the Commission to decide, and a correction of error standard would be appropriate under our prior case law.

Because Savage's petition for redetermination was filed after January 1, 1988, the Utah Administrative Procedure Act ("UAPA")[14] governs our review of the Commission's decision denying that petition. We therefore must inquire into what effect that act has upon the standard of review of the Commission's interpretation of law. In its 1987 legislative session, the Utah Legislature enacted the UAPA for the direction, governance, and review of all agency action within the state. Specifically, section 63-46b-16(4) governs appellate review of agency decisions made after a formal adjudicative hearing. Section 63-46b-16(4) states:

> (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
>
> (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
>
> (b) the agency has acted beyond the jurisdiction conferred by any statute;
>
> (c) the agency has not decided all of the issues requiring resolution;
>
> (d) the agency has erroneously interpreted or applied the law;
>
> (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
>
> (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
>
> (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
>
> (h) the agency action is:
>
> (i) an abuse of the discretion delegated to the agency by statute;
>
> (ii) contrary to a rule of the agency;
>
> (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
>
> (iv) otherwise arbitrary or capricious.

[2] The Commission argues that the language of section 63-46b-16(4) requires us to give deference to agency decisions. This argument is based on the language in subsection (4) requiring that "substantial prejudice" be shown before a court may grant relief from agency action. The Commission's position is that this phrase implies that we should give deference to agency decisions and that we should uphold those decisions unless they are "substantially" incorrect.

The phrase "substantial prejudice" within subsection (4) refers to the "person seeking review." It does not modify the actual standards of review found within subsection (4). This means that the person seeking review of an agency action must suffer substantial prejudice as a result of that action before a court may grant relief from the action. This portion of subsection (4) relates to the damage or harm suffered by the person seeking review and was written to ensure that a court will not issue advisory opinions reviewing agency action when no true controversy has resulted from that action. The phrase simply does not relate to the degree of deference a court must give an agency decision.

In this case, Savage has been substantially prejudiced by the Commission's decision denying its petition for redetermination. Savage's subsidiaries have been denied the use of over $300,000 in tax deductions in the form of loss carryovers. Therefore, the substantial prejudice requirement of subsection (4) is clearly met.

[3] Under section 63-46b-16(4)(d), a court may grant relief based upon an agency's erroneous interpretation of law. This incorporates the correction of error standard previously applied by the Utah courts in cases involving agency interpretations of law. This incorporation of the correction of error standard is confirmed by looking at the legislative history of the UAPA. The Utah Administrative Procedure Act was patterned after the Model State Administrative Procedure Act.[15] Section 63-

9. 767 P.2d 524 (Utah 1988).

10. *See id.* at 528.

11. 791 P.2d 511 (Utah 1990).

12. *Id.* at 513-14 (citations omitted).

13. This standard has evolved through several Utah cases, beginning prior to *Department of Administrative Services*. *See, e.g., Salt Lake City Corp. v. Department of Employment Sec.*, 657 P.2d 1312, 1316 (Utah 1982), *Big K Corp.*, 689 P.2d at 1353 (applying a correction of error standard "unless the Commission by virtue of expertise and experience with the regulatory scheme is in a superior position to give effect to the regulatory objectives to be achieved or the terms of the statute make clear that the Commission was intended to have broad discretion in construing those terms"), *Bennett*, 726 P.2d at 429.

14. Utah Code Ann. §§ 63-46b-1 through -22 (1989).

15. Comments of the Utah Administrative Law Advisory Committee, Utah A.P.A., at 15 (Code Co-Law Publishers, April 25, 1988).

46b-16(4) is in nearly all respects identical to the Model Act's section 5-116(c). Therefore, helpful information about the intended scope and application of Utah's Act can be obtained by resort to the comments and cases concerning the Model Act and its application in other states. In reviewing subsection 5-116(c)(4) of the Model Act (the equivalent of subsection 63-46b-16(4)(d) of Utah's Act), the commentators stated:

> Paragraph (c)(4) includes two distinct matters—interpretation and application of the law. With regard to the agency's interpretation to [sic] the law, courts generally give little deference to the agency, with the result that a court may decide that the agency has erroneously interpreted the law if the court merely disagrees with the agency's interpretation.[16]

This comment confirms that under the Model Act and therefore under the UAPA, an agency's interpretation of the law is to be reviewed using a correction of error standard. It is clear that the Commission's decision in this case is to be reviewed for correctness, giving no deference to the Commission's interpretation of the law. This approach is mandated whether arrived at under the terms of the UAPA or under the holdings of our prior case law. We will therefore review the Commission's decision concerning Savage's petition for redetermination using a correction-of-error standard.

II. SECTION 59-7-108(14)(f).

Turning now to the merits of the case, the basic issue presented is the correct interpretation of Utah Code Ann. § 59-7-108(14)(f), which prohibits an acquiring corporation from using preacquisition losses of an acquired corporation. Utah Code Ann. § 59-7-108(14)(f) (1987) reads: "Corporations acquiring the assets or stock of another corporation may not deduct any net loss of the acquired corporation incurred prior to the date of acquisition."

[4, 5] The terms of a statute should be interpreted in accord with usually accepted meanings.[17] In construing legislative enactments, the reviewer assumes that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.[18]

[6] The plain language of section 59-7-108(14)(f) is specific in its operation and intent. The section specifically prohibits the deduction of certain types of net loss carryovers, those incurred by an acquired corporation prior to the date of its acquisition. Section 59-7-108(14)(f) is also specific as to who is prohibited from deducting preacquisition loss carryovers. The section prohibits all "corporations acquiring the assets or stock of another corporation" from taking these deductions. All other corporations or entities are left outside the prohibitions of the statute. Therefore, by the plain terms of the statute, the acquired corporation is not prohibited from deducting its preacquisition losses merely because its stock has been purchased by another entity.[19] The acquired corporation does not fit within the statute's specific prohibitions and should be free to deduct the preacquisition losses from its own income.

[7] The Commission argues that the filing of consolidated returns by petitioner somehow transforms the deductions by the acquired corporations into those of Savage Industries, the acquiring corporation. While the filing of a consolidated return does create a single taxing unit which includes both the acquiring and the acquired corporation, the form of the consolidated return does not change the deduction from one of the acquired corporation. The consolidated return is not merely the return of the acquiring or parent corporation. All deductions taken on the return should not therefore be considered to be the deductions of the parent corporation. The Commission's own regulations regarding preparation and filing of a consolidated return make it clear that the corporations filing such returns maintain their separate identities although a single tax is calculated for the group. Tax Commission regulation R865-6-4F(G) states that the parent corporation acts as the agent for the consolidated group. This provision does not state that the return is considered that of the parent; indeed, it mandates that the group must notify the Commission of its new agent if the parent is contemplating dissolution and is not qualified to file as part of the consolidated return. Regulation R865-6-4F(H) allows the Commission to pursue individually the subsidiaries that make up the group if the tax is filed improperly as separate returns. Therefore, it is clear that the return is filed for each member of the affiliated group and is not just that of the parent corporation.

The form of the return itself also makes distinctions between the parent corporation and its individual subsidiaries. Under R865-6-4F(J)(3), separate schedules for each corporate entity listing income and deductions must be filed with the consolidated return. It is on these separate schedules that the deductions at issue were taken by the acquired corporations. The deductions were only taken in years when the specific acquired corporations had sufficient income to offset the previous losses.[20] The deductions taken by KNT and Savage Western were the separate deductions of these acquired corporations. The fact that they were taken in years when the acquired corporations filed consolidated returns does not make them the deductions of Savage Industries, the acquiring corporation, and does not make the deductions violations of section 59-7-108.

[8-10] The Commission argues that the allowance of deductions for preacquisition losses by an acquired corporation will violate the legislative intent of section 59-7-108. This court's primary responsibility in construing legislative enactments is to give effect to the legislature's underlying intent.[21] "In determining the legislative intent of a statute, 'the statute should be considered in the light of the purpose it was designed to serve and so applied as to carry out that purpose if it can be done consistent with its language.' "[22] The Commission cites no legislative record or other history to ascertain the intent of the legislature in drafting section 59-7-108. Therefore, in attempting to determine legislative intent, we should look first to the plain meaning of the language at issue in the statute.[23] The words of the statute indicate an intent to prevent buying of loss corporations by high profit corporations solely for the use of the loss corporation's previous loss carryover deductions. A further intent may be to limit the use of loss carryover deductions to those corporations which have previously suffered the losses and therefore are entitled to average their low income years with their high income

16. Model State Admin. Procedure Act § 5-116 comment, 15 U.L.A. 127-30 (1981).

17. *Utah County v. Orem City*, 699 P.2d 707, 708 (Utah 1985).

18. *Amax Magnesium Corp. v. Tax Comm'n*, 796 P.2d 1256, 1258 (Utah 1990); *Horne v. Horne*, 737 P.2d 244, 247 (Utah Ct.App.1987).

19. This situation differs from instances where the acquired corporation is merged into the acquiring corporation. There, the surviving corporation is the "acquiring" corporation, and it appears that the deduction would be prohibited. *See generally Golf Digest/Tennis Inc. v. Dubno*, 203 Conn. 455, 525 A.2d 106, 110-11 (1987); *Fieldcrest Mills, Inc. v. Coble*, 290 N.C. 586, 227 S.E.2d 562, 574 (1976).

20. The prior net losses of Western Rock were not deducted until 1985, although they were incurred in 1983. This was because Western Rock itself did not generate sufficient income to offset these net losses until 1985. During the intervening years, however, Savage Industries had net income sufficient to offset these losses. The fact that Savage Industries did not seek to use these losses illustrates the proper application of this statute to the acquiring corporation.

21. *See Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980); *Salt Lake City v. Salt Lake County*, 568 P.2d 738, 741 (Utah 1977); *Utah Farm Bureau Ins. Co. v. Utah Ins. Guar. Ass'n*, 564 P.2d 751, 754 (Utah 1977).

22. *Utah Power & Light v. Municipal Power Sys.*, 784 P.2d 137, 141 (Utah 1989) (quoting *Johnson v. State Tax Comm'n*, 17 Utah 2d 337, 411 P.2d 831, 832 (1966))

23. *Chris & Dick's Lumber v. Tax Comm'n*, 791 P.2d 511, 514 (Utah 1990), *Allisen v. American Legion Post No. 134*, 763 P.2d 806, 809 (Utah 1988).

years.[24]

Evaluation of the current case shows that the allowance of preacquisition losses by the acquired corporation does not violate this intent. Allowance of the deduction does not encourage high profit corporations to buy loss companies merely for the purpose of deducting loss carryovers, as the high profit company is required to turn around the loss corporation until it generates profit before any carryovers may be deducted. This type of turnaround of loss corporations is not the type of loss "manipulation" the legislature intended to prohibit by the statute. The secondary intent of the statute is also furthered by allowing acquired corporations to deduct loss carryovers. The subsidiary or entity which incurred the loss is the one that later is able to benefit from the carryover in averaging its income between high and low income years. No deduction may be taken by the acquired corporation or any affiliated group of which it is a member until that acquired corporation generates enough income to offset the loss carryover.

[11] The Commission also urges that the deduction sought by Savage Industries should not be allowed because it will encourage corporations to manipulate assets between parent and subsidiaries to wrongfully take advantage of the net loss carryovers by the transfer of profitable operations to the companies with prior net losses. The simple response to this argument is that the statute must be enforced as it is written, and as written, it does not prevent that type of manipulation. Further, there is no evidence of misuse of assets or of the feared manipulation in this case. Savage Industries was formed to consolidate and manage existing corporations owned by the Savage brothers. The organization and corporate ownership of these corporations remained the same both before and after the formation of Savage Industries and the stock purchases by which KNT and Savage Western became Savage Industries subsidiaries. The entire thrust of these transactions appears to have been for organization and management purposes and not for tax manipulation.

Even the Commission's interpretation of the statute would not prevent manipulation of corporate assets for the purpose of accruing tax deductions based on preacquisition losses. A mere reversal of parent and subsidiary positions by corporations would allow the "parent" loss corporation to take advantage of its losses incurred prior to the purchase of the profitable "subsidiary." This type of manipulation, as well as that feared by the Commission under our interpretation of the statute, is not addressed in section 59-7-108 and is better dealt with through other means such as careful Commission auditing of [illegible] company transfers. The interpretation of the statute to allow acquired corporations to deduct the prior net losses does not prevent alternate means for discovering improper manipulation of assets.

We therefore hold that the statute as written does not prohibit an acquired corporation from taking advantage of its loss carryovers incurred prior to the date of acquisition in order to offset its own as opposed to the acquiring corporation's income. The deduction may be taken by the acquired corporation, whether filing separately or filing a consolidated return as part of an affiliated group. The decision of the Commission denying Savage's petition is reversed, and the case is hereby remanded to the Commission for proceedings consistent with this opinion.

HOWE, Associate C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

24. *See Fieldcrest*, 227 S.E.2d at 565 (discussion of the purpose behind allowance of loss carryovers as deductions from corporate franchise tax).

OLYMPIC STEAMSHIP COMPANY, INC., Petitioner,

v.

CENTENNIAL INSURANCE COMPANY and Atlantic Mutual Insurance Company, Respondents,

and

New York Marine and General Insurance Company and Marsh and McLennan, Inc., Defendants.

No. 57167-8.

Supreme Court of Washington, En Banc.

May 23, 1991.

As Changed May 29, 1991.

After insured warehouseman paid claims of salmon packers for cost of inspecting cans of salmon which they recalled after it was determined that some had been damaged by the warehouseman, it sought reimbursement from its general comprehensive liability insurer. The Superior Court, King County, John M Darrah, J., granted relief and insurer appealed. The Court of Appeals, 57 Wash.App. 517, 789 P.2d 309, reversed. The Supreme Court, Dore, C.J., held that: (1) sistership clause does not apply when product is withdrawn by third party; (2) cans of salmon were not the insured's product for purposes of the sistership clause; and (3) insured was entitled to recover attorney fees.

Affirmed.

1. Judgment ⇐181(2, 3)

Summary judgment motion can be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

2. Insurance ⇐435.24(2), 513

Exclusion from comprehensive general liability policy for damages claimed for the withdrawal, inspection, or loss of use of the named insured's products form if they are withdrawn from the market or from use because of any known or suspected defect or deficiency therein is a "sistership clause."

See publication Words and Phrases for other judicial constructions and definitions.

3. Insurance ⇐513

Intent of sistership exclusion from liability policy is to exclude the cost of preventing defects of failures in the insurance goods or property.

4. Insurance ⇐513

Under sistership clause, general liability insurer is not liable for costs of preventative or curative action taken by its insured.

5. Insurance ⇐435.24(2)

Sistership clause in comprehensive general liability policy issued to warehouseman did not exclude coverage for warehouseman's liability following salmon packers' withdrawal from the market of cans of salmon because it was determined that machinery used by the warehousemen to place label on the cans had caused damage to a small percentage of them, as it was not the insured warehouseman which withdrew the product from the market.

6. Insurance ⇐435.24(2)

For purposes of sistership exclusion from general liability policy, the term "insured's product" refers to goods or products in which the insured trades or deals, including goods created or manufactured by the insured.

7. Insurance ⇐435.24(2)

Cans of salmon which packers sent to insured warehouseman for labeling, casing, and shipping, were not the "insured's product" for purposes of sistership exclusion, so that insured was entitled to coverage for its liability to the packers after they withdrew the cans of salmon from the market because some had been damaged during labeling.

8. Insurance ⇐435.24(2)

Term "handle" as used in sistership exclusion from general comprehensive liability policy means to buy, sell, distribute,

the district court first granted partial summary judgment in favor of the Bank on the claim for punitive damages. The district court later dismissed the plaintiff's petition for failure to state a claim upon which relief could be granted, basing its decision on K.S.A.1987 Supp. 60–213(a), the compulsory counterclaim statute, and the doctrines of res judicata and collateral estoppel. Everett Loving timely appeals.

[1] The first issue is whether the district court erred in relying upon K.S.A.1987 Supp. 60–213(a) in dismissing the tort claims. The statute reads:

"(a) *Compulsory counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, *if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim* and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction...." (Emphasis added.)

While the statute itself does not explicitly provide that failure to plead a compulsory counterclaim precludes the pleader from asserting it in a subsequent action, this court has consistently applied the statute in that fashion. See *Mohr v. State Bank of Stanley*, 241 Kan. 42, 51, 734 P.2d 1071 (1987); *Haysville State Bank v. Hauserman*, 225 Kan. 671, 673, 594 P.2d 172 (1979); *Stock v. Nordhus*, 216 Kan. 779, 781, 533 P.2d 1324 (1975) (citing 6 Wright & Miller, Federal Practice and Procedure: Civil § 1417 [1971]). K.S.A.1987 Supp. 60–213(a) is virtually identical to Federal Rule of Civil Procedure 13(a). The Advisory Committee's Note to Rule 13 explicitly states:

"If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred."

6 Wright & Miller, Federal Practice and Procedure: Civil § 1417, p. 95 n. 32.

Judge Gard explains the Kansas rule as follows:

"By the new rule, which is now the same as in the federal courts, the assertion of counterclaims and setoffs by way of answer, if they arise out of the transaction or occurrence that is the subject of the plaintiff's claim, is *mandatory*. Failure to assert results in an estoppel or bar.

....

"... The test, so far as the mandatory requirement is concerned, depends on whether the counterclaim or setoff arises out of the same transaction." 1 Gard's Kansas C.Civ.Proc. § 60–213(a), pp. 77–78 (1979).

[2] It is well established in Kansas that the failure to assert a compulsory counterclaim prevents a party from bringing a later independent action on that claim. It is clear that the claims asserted in the present action should have been asserted in the earlier foreclosure action. In that action Everett E. Loving testified at length as to his negotiations with Regalado and the Bank. In fact, in his testimony he raised the issue of the $20,000 and asserted they were entitled to a credit or setoff of that amount in the foreclosure action. That contention was determined adversely to the Lovings by the court. The same $20,000 was also the subject matter of the federal court action. The issue of the right to the $20,000 paid by Regalado to the F.L.B. has been litigated on at least two prior occasions.

[3] Appellant makes several arguments in support of his position that his claims in this action are different from those in the foreclosure action and are not compulsory counterclaims under K.S.A.1987 Supp. 60–213(a). However, his principal argument seems to be that because the mortgage foreclosure action was an equitable action, the present claims, which sound in tort, could not be the subject of a compulsory counterclaim. The argument has no merit. Numerous foreclosure actions have implicitly recognized that legal counterclaims sounding in tort may be asserted by a defendant in an equitable action to foreclose a mortgage. *E.g., Bank of Whitewater v. Decker Investments, Inc.*, 238 Kan. 308, 314, 710 P.2d 1258 (1985), and cases cited therein.

[4] As stated by Gard, the essential test of a mandatory counterclaim depends upon whether the counterclaim or setoff arises out of the same transaction. The mortgage foreclosure action arose from the loan transaction between the Lovings and the F.L.B., and the subsequent default on the payments due on the loan. In fact, the $20,000 asserted in the appellant's conversion claim is the identical $20,000 which was a part of the litigation between these same parties in the earlier foreclosure action. It is difficult to imagine a claim that could more clearly or directly arise out of the same transaction than a dispute in an action on a note over the proper crediting of alleged payments on the note.

Although appellant asserts other arguments in support of his contention that K.S.A.1987 Supp. 60–213(a) does not apply, we find them to be equally without merit. We hold that the claims attempted to be asserted herein were compulsory counterclaims which should have been asserted in the earlier foreclosure action and are now barred by K.S.A.1987 Supp. 60–213(a). In view of the decision reached on the first issue, it is not necessary to address other issues raised on appeal.

The judgment is affirmed.

244 Kan. 126

W.W. TAYLOR, Mrs. W.W. Taylor or A. Genevieve Taylor, Michael C. Taylor, John S. Taylor, David J. Taylor, and Mark B. Taylor, A Partnership known as Taylor Family Real Estate Trust, Appellants,

v.

PERDITION MINERALS GROUP, LTD., Henry N. Mulvihill, Marvin Echols, Jack Griggs, Charles Harris, Leo Meeker, and Robert E. Fondren, Appellees.

No. 61573.

Supreme Court of Kansas.

Dec. 14, 1988.

Buyers of corporation's securities brought action against corporation's directors, among others, to rescind purchase and recover purchase price based upon violations of registration and misrepresentations under Kansas Securities Act. The Sedgwick District Court, Nicholas W. Klein, J., entered summary judgment in favor of directors, and buyers appealed. The Supreme Court, Six, J., held that strict liability would be imposed on directors, regardless of whether they materially aided in sale, unless they proved that they could not reasonably have had knowledge of facts by reason of which liability was alleged to exist.

Reversed and remanded.

1. Securities Regulation ⇐256

Pursuant to Kansas Securities Act, strict liability is imposed on partners, officers, and directors to buyers of unregistered securities sold in violation of statute, regardless of whether partner, officer, or director materially aided in sale, unless he or she proves that he or she could not reasonably have had knowledge of facts by reason of which liability is alleged to exist. K.S.A. 17–1268(b).

2. Securities Regulation ⇐246

"Blue Sky" provisions are to be liberally interpreted in favor of buyers of securities to prevent fraud.

Syllabus by the Court

1. K.S.A.1987 Supp. 17–1268(b) is substantially similar to § 410(b) of the Uniform Securities Act, 7B U.L.A. 643 (1958). Strict liability is imposed on partners, officers, and directors to purchasers of unregistered securities sold in violation of the statute regardless of whether the partner, officer, or director materially aided in the sale unless he or she proves that he or she could not reasonably have had knowledge of the facts by reason of which liability is alleged to exist.

2. The changes in punctuation and phrasing effected by the legislature in

transforming § 410(b) of the Uniform Securities Act, 7B U.L.A. 643 (1958), into K.S.A. 1987 Supp. 17-1268(b) do not insulate directors from strict liability when unregistered securities are sold unless the director proves the statutory defense.

3. K.S.A.1987 Supp. 17-1268(b) does not require that a director materially aid in the illegal sale of securities in order to be held jointly and severally liable for the sale.

4. The K.S.A.1987 Supp. 17-1268(b) critical phrase, "of such a seller who materially aids in the sale," which follows the word "employee," was intended to modify only "employee" and was not intended to reach back further into the language of the statute and also modify "every partner, officer, or director."

Donald W. Bostwick, of Adams, Jones, Robinson & Malone, Chartered, Wichita, argued the cause, and Cynthia S. Dunne, of the same firm, was with him on the brief for appellants.

H.E. Jones, of Hershberger, Patterson, Jones & Roth, Wichita, argued the cause, and Kelly J. Rundell, of the same firm, was on the brief for appellee Harris.

Tom R. Smith, of Smith & Miles, Chartered, Liberal, argued the cause and was on the brief for appellees Meeker and Echols.

SIX, Justice:

This first impression statutory construction case involves the interpretation of K.S.A.1987 Supp. 17-1268(b) of the Kansas Securities Act. Must a director have materially aided in the sale of unregistered securities to be liable for their illegal sale?

The plaintiffs, W.W. Taylor, Mrs. W.W. Taylor or A. Genevieve Taylor, Michael C. Taylor, John S. Taylor, David J. Taylor, and Mark B. Taylor, a partnership known as Taylor Family Real Estate Trust, (Taylors) appeal from a summary judgment in favor of the director defendants Charles Harris, Leo L. Meeker, Marvin Echols, and Jack Griggs.

The trial court found that, under K.S.A. 1987 Supp. 17-1268(b), a director of a corporation is not liable for the illegal sale of the corporation's securities unless the plaintiff can show that the director materially aided in the sale. The trial court ruled that the four director defendants did not materially aid in the securities sale to the Taylors.

We disagree with the trial court's analysis.

The parties by agreement have characterized Harris as a representative director defendant. Rulings as to Harris apply equally to the other director defendants, Meeker, Echols, and Griggs.

The questions to be decided are:

(1) Does K.S.A.1987 Supp. 17-1268(b) require that directors must materially aid in the sale of a corporation's securities to be held liable for the sale?

(2) Did the director defendants materially aid in the securities sale to the plaintiffs?

(3) Did the director defendants show that they did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist?

We hold that K.S.A.1987 Supp. 17-1268(b) is substantially similar to § 410(b) of the Uniform Securities Act, 7B U.L.A. 643 (1958). Strict liability is imposed on partners, officers, and directors to purchasers of unregistered securities sold in violation of the statute regardless of whether the partner, officer, or director materially aided in the sale unless he or she proves that he or she could not reasonably have had knowledge of the facts by reason of which liability is alleged to exist.

1. *The Facts of the Investment*

In early November of 1981, W.W. Taylor discussed an oil and gas exploration investment, Perdition Minerals Group, Ltd., (Perdition) with his neighbor, Donald Schrag. Taylor became interested and the two men placed a call to Bob Fondren, a securities broker, who had previously supplied Schrag with information on the corporation. Taylor spoke with Fondren who told

him: (1) The stock was worth $1.84 a share and would be worth more soon; (2) the company had a lot of oil and gas in Montana; (3) the company was going to do an audit, and (4) the company was preparing to go public. Schrag indicated to Taylor that he was going to buy $200,000 worth of stock at $.50 a share.

Soon after Taylor's discussions with Schrag and Fondren, Schrag arranged a meeting between Taylor and Henry Mulvihill, who was Perdition's chief executive officer. Taylor was supplied with a financial statement and Mulvihill's personal resume. Mulvihill also described the production and value of the acreage held by Perdition in Montana. Taylor did not ask to see any drilling reports or geographical information. Mulvihill told Taylor that several hundred thousand dollars was needed to meet current drilling and lease expenses. Mulvihill gave Taylor a list of references, several of whom Taylor knew, including defendant Charles Harris. Taylor did not contact any of the references. Taylor told Mulvihill that he would purchase 400,000 shares of Perdition for $200,000; $100,000 on behalf of himself and his wife, and $100,000 on behalf of his children.

Taylor attended a Perdition shareholders' meeting on November 20, 1981. He met privately with Mulvihill prior to the meeting. At this private meeting, Mulvihill reassured Taylor that the stock was worth more than $1.84 a share and that he was going to do an audit. There is no evidence in the record indicating that any directors or shareholders of Perdition, other than Mulvihill, Schrag, and Fondren, made any representations to Taylor or were in any way involved with the sale of stock to him.

At the November 20, 1981, shareholders' meeting, Mulvihill introduced Taylor as a potential Perdition investor. No one inquired as to the circumstances surrounding the issuance of the stock. Defendant Harris was present at the meeting and moved to hire Elmer Fox to audit the company. Harris said that he made the motion based on a recommendation by Mulvihill. Taylor testified at his deposition that prior to the shareholders' meeting, Mulvihill had never given any indication that Harris was Perdition's attorney.

Mulvihill, for tax purposes, had incorporated Perdition in Nevada. Mulvihill and Harris were close friends. In November of 1981, Harris agreed to purchase 2,500 shares of Perdition. Harris is a Wichita attorney. He testified at his deposition that the only legal work he had done on behalf of Perdition was to draw up an employment agreement between Perdition and Milan Ayers. Ayers managed the Montana properties. Mulvihill retained a Denver law firm which specializes in securities and oil and gas law to handle the corporation's other legal matters.

At the time Harris bought his shares, Mulvihill was the sole director and the parent of Perdition. In January 1981, a shareholders' meeting was held at which defendants Marvin Echols, Jack Griggs, Charles Harris, Leo Meeker, and Henry Mulvihill were elected directors. With the exception of Jack Griggs, all the director defendants invested money in Perdition and lost their investment when Perdition became insolvent. The shareholders voted to increase the authorized common stock from 500,000 shares to 4,000,000 shares and to split the outstanding 500,000 shares four for one, into 2,000,000 shares.

Early in 1982, when no audit was forthcoming, Taylor became concerned about his investment. Mulvihill assured Taylor that the audit was being done. Taylor then spoke to a friend who did business with the Elmer Fox accounting firm and asked him to check into Perdition. His friend told him: (1) Fox had no business relationship with Perdition, (2) the SEC had been investigating the Montana properties, and (3) Perdition's current financial statements did not reflect Taylor's $200,000 investment. The 400,000 shares of stock of Perdition purchased by the Taylors were never registered in accordance with K.S.A. 17-1256, -1257, or -1258. The sale of these 400,000 shares of stock of Perdition was not the sale of an exempt security under K.S.A. 1987 Supp. 17-1261, nor was it an exempt transaction under K.S.A.1987 Supp. 17-1262.

The Taylors filed the instant lawsuit against Perdition, Mulvihill, Fondren, and the director defendants to rescind the purchase and recover the purchase price based upon violations of registration and misrepresentations under the Kansas Securities Act. The petition alleged that the Perdition stock was not registered pursuant to Kansas law and that Mulvihill and Fondren made misleading and false statements upon which Taylor relied in purchasing the stock.

The trial court entered summary judgment in favor of the director defendants Harris, Echols, Meeker, and Griggs, finding that, under K.S.A.1987 Supp. 17-1268(b), an innocent director must be shown to have materially aided in the sale of securities to be liable. The trial court further found that the facts of the case did not establish that the four directors materially aided in the sale to Taylor.

2. *The Statute, K.S.A.1987 Supp. 17-1268*

K.S.A.1987 Supp. 17-1268(a) establishes the liability of any person who sells a security which is required to be registered under K.S.A. 17-1255 but is not registered, or any person who sells a security by means of untrue statements of material facts. Such a person may be liable to the person buying the security for the consideration paid for the security plus interest, costs, and attorney fees.

The alleged liability of the director defendants is based on K.S.A.1987 Supp. 17-1268(b), which provides:

"Every person who directly or indirectly controls a seller liable under subsection (a), *every partner, officer, or director (or person occupying a similar status or performing similar functions) or employee of such a seller who materially aids in the sale,* and every broker-dealer or agent who materially aids in the sale is also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that such nonseller did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable." (Emphasis added.)

The Taylors contend that the Kansas statute is a "substantially verbatim" enactment of § 410(b) of the 1956 Uniform Securities Act as amended in 1958. A comparison of the two reveals minor differences in punctuation and phrasing. These differences, the director defendants assert, give the statute a different meaning from the corresponding section of the Uniform Securities Act. Section 410(b) of the Uniform Act provides:

"Every person who directly or indirectly controls a seller liable under subsection (a), *every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale,* and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable." (Emphasis added.)

K.S.A.1987 Supp. 77-201 establishes rules for statutory construction and requires that words and phrases be construed according to the context and approved usage of the language.

The director defendants, in comparing K.S.A.1987 Supp. 17-1268(b) and § 410(b) of the Uniform Act, reason as follows: The legislature by (1) removing the modifying phrase "of such a seller" after the word director; (2) placing the phrase "or person occupying a similar status or performing similar functions" in parenthesis, (3) and adding an "or" before the word employee intended the phrase "of such a seller who materially aids in the sale" to modify the entire clause "every partner, officer, or director (or person occupying a similar status or performing similar functions) or employee." We do not agree.

The National Conference of Commissioners on Uniform State Laws approved the Uniform Securities Act in 1956. In 1957, Kansas, using the Uniform Act as a model, enacted the Kansas Securities Act. Lovitch, *Securities Registration Under the Kansas Securities Act,* 22 Kan.L.Rev. 565, 566 (1974).

The changes in punctuation and phrasing effected by the legislature in transforming § 410(b) of the Uniform Act into K.S.A. 1987 Supp. 17-1268(b) do not insulate directors from strict liability when unregistered securities are sold.

The states that have passed § 410(b) of the Uniform Securities Act have consistently interpreted the statute to impose strict liability on partners, officers, and directors unless the statutory defense of lack of knowledge is proven. See, *e.g., Moerman v. Zipco, Inc.,* 302 F.Supp. 439, 450 (E.D.N.Y.1969), *aff'd* 422 F.2d 871 (2d Cir.1969); *Mitchell v. Beard,* 256 Ark. 926, 928, 513 S.W.2d 905 (1974); *Arnold v. Dirrim,* 398 N.E.2d 426, 433-34 (Ind.App.1979); *Rzepka v. Farm Estates Inc.,* 83 Mich.App. 702, 709, 269 N.W.2d 270 (1978).

We question the trial court's reliance on *Lanza v. Drexel & Co.,* 479 F.2d 1277 (2d Cir.1973). *Lanza* arose under federal, not state, securities laws. The plaintiffs in *Lanza* sought compensatory and punitive damages against former officers and directors of a corporation based on violations of federal securities acts and common-law fraud. The Second Circuit Court of Appeals was construing Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5 (1988); and § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982). The court in *Lanza* discussed state "blue sky laws" in a footnote.

"State blue sky laws universally exempt directors from liability for fraud perpetrated by corporate officers unless the directors are in some meaningful sense culpable participants in the fraud." 479 F.2d at 1308 n. 105.

The *Lanza* court identified two types of state laws. The first are those modeled after § 410(b) of the Uniform Act and the second are those in which a director is exempt from liability unless he or she participates in the sale. The *Lanza* court in footnote 105 refers to fraud; nevertheless, the court correctly characterized the Kansas statute as belonging to the first category.

[1, 2] K.S.A.1987 Supp. 17-1268(b) does not require that a director materially aid in the illegal sale of securities in order to be held jointly and severally liable for the sale.

Our analysis of legislative intent commences with the observation that "Blue Sky" provisions are to be liberally interpreted in favor of purchasers to prevent fraud. *Daniels v. Craiglow,* 131 Kan. 500, 292 Pac. 771 (1930).

Kansas has required registration of securities since 1911. L.1911, ch. 133.

The first securities statute with teeth was passed in Kansas. Loss, Fundamentals of Securities Regulation 8 (2d ed. 1988). According to Professor Louis Loss, Kansas had been a "stronghold" of populist philosophy. The resulting carryover today is to be found in the relative strictness of Midwestern securities statutes. "Indeed, it was in Kansas, apparently, that the term 'blue sky law' first came into general use to describe legislation aimed at promoters who 'would sell building lots in the blue sky in fee simple.'" Loss, Fundamentals of Securities Regulation 8.

The drafters comment to § 410(b) of the Uniform Securities Act observes, "This section is now in the Kansas act substantially verbatim, and Virginia has adopted it with modifications." Loss and Cowett, Blue Sky Law 393 (1958).

We have in past cases identified rules to assist in statutory construction:

(1) "The fundamental rule of statutory construction is that the purpose and intent of the legislature governs when the intent can be ascertained from the statute. In construing statutes, the legislative intention is to be determined from a general

consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible." *State v. Adee*, 241 Kan. 825, 829, 740 P.2d 611 (1987).

(2) "Interpretation of a statute is a question of law, and it is the function of the court to interpret a statute to give it the effect intended by the legislature. *State, ex rel., v. Unified School District*, 218 Kan. 47, 49, 542 P.2d 664 (1975). It is a fundamental rule of statutory construction to which all other rules are subordinate that the intent of the legislature governs when that intent can be ascertained. *State v. Sexton*, 232 Kan. 539, 657 P.2d 48 (1983)." *Director of Taxation v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, 455, 691 P.2d 1303 (1984).

What did the legislature intend the phrase, "of such a seller who materially aids in the sale" following the word "employee" to modify? Was the phrase intended to modify only an "employee" of such seller, or was it intended to reach back further into the language of the statute and also modify "every partner, officer, or director"? We are persuaded the critical phrase modifies only "employee" of such seller.

If the legislature had intended to make directors liable only in the event they had materially aided in the sale, the Kansas language could easily have read, "every partner, officer, or director *of such a seller who materially aids in the sale.*" (Emphasis added.)

In our K.S.A.1987 Supp. 17-1268(b) search for legislative intent we note 2A Sutherland Statutory Construction § 47.33 (4th ed. rev. 1984):

> "Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' Thus a proviso usually is construed to apply to the provision of clause immediately preceding it. The rule is another aid to discovery of intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent.
>
> "Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."

No comma was inserted in K.S.A.1987 Supp. 17-1268(b) separating the critical qualifying phrase, "who materially aids in the sale" from the antecedents partner, officer, or director or employee.

The Kansas version of the Uniform Act was adopted in 1957. L.1957, ch. 145. The K.S.A.1987 Supp. 17-1268(b) equivalent section of the prior law, G.S.1949, 17-1240, was found in the securities section of the corporation code. G.S.1949, 17-1240 provided, in part:

> "Every sale or contract for sale made in violation of any of the provisions of this act shall be voidable at the election of the purchasers; and the person making such sale or contract for sale and *every director, officer or agent of or for such seller who shall have participated or aided in any way in making such sale shall be jointly and severally liable* to such purchaser in an action at law in any court of competent jurisdiction...." (Emphasis added.)

Prior to the adoption of K.S.A.1987 Supp. 17-1268(b), a director of a seller was liable only if he or she "participated or aided in any way in making such sale."

Section 410(b) of the Uniform Act altered a director's liability status. Strict director liability was imposed by § 410(b) unless the statutory defense of lack of knowledge was proven. If the Kansas Legislature in 1957 had intended to continue to provide the "materially aids in the sale" shield to Kansas directors it could easily have used the G.S.1949, 17-1240 concept that had been in place since 1929. L.1929, ch. 140.

3. *Did the Director Defendants Materially Aid in the Sale to the Plaintiffs?*

Our resolution of the K.S.A.1987 Supp. 17-1268(b) statutory construction question disposes of the Taylors' second issue.

The trial court found that facts constituting material aid by the director defendants were not present in the sale to the plaintiffs and granted the defendants summary judgment on this issue.

Our construction of K.S.A.1987 Supp. 17-1268(b) reverses the trial court's ruling on summary judgment and removes the necessity for an analysis of this issue.

We need not determine what constitutes "material aid" under K.S.A.1987 Supp. 17-1268(b).

4. *The K.S.A.1987 Supp. 17-1268(b) Statutory Defense*

We have held that K.S.A.1987 Supp. 17-1268(b) imposes strict liability on directors as nonselling parties unless the statutory defense of lack of knowledge is proven. The statute provides a defense to liability where the nonseller can show that he or she "did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist"—the lack of knowledge defense.

As their third issue, the Taylors contend that this defense is not available to the director defendants because they have not met the burden of proof required under this provision. We need not address this issue.

In its journal entry granting the director defendants summary judgment, the trial court specifically found that there are contested issues relating to the statutory defense, but that these issues were immaterial since the Taylors had not established a prima facie case. The K.S.A.1987 Supp. 17-1268(b) statutory defense issue was not determined by the trial court's summary judgment ruling which is the basis of this appeal.

We remand the case for trial. The Taylors have established a prima facie case. The statutory defense issue will be determined by the trier of fact.

REVERSED AND REMANDED.

244 Kan. 136

STATE of Kansas, Appellee,

v.

Gary WADE, Appellant.

No. 61678.

Supreme Court of Kansas.

Jan. 3, 1989.

Defendant was convicted in the Shawnee District Court, Thomas W. Regan, J., of aggravated criminal sodomy, and he appealed. The Supreme Court, Six, J., held that: (1) failure of information to allege that child victim was not married to offender was not fundamental defect rendering defendant's aggravated criminal sodomy conviction void by depriving trial court of jurisdiction; (2) it is legal impossibility for five-year-old to be married; and (3) lay testimony of child protection case worker who investigated alleged sexual abuse was properly admitted on redirect examination to describe what case worker looked for when required to make sexual abuse case determination judgment call, behavior of children who told her they had been sexually abused, and conclusion that behavior was consistent with behavior observed in child who was alleged victim.

Affirmed.

1. Sodomy ⇐1

That child victim is not married to offender is one of the essential elements of crime of aggravated criminal sodomy,

826, 827 (1932), "[T]he use by individual persons in common with the public generally is regarded as permissive, and by such common use no individual person can acquire a right by prescription as against the owner of the fee." See also *Bertolina v. Frates*, 89 Utah 238, 57 P.2d 346 (1936).

[6] The record in the instant case shows that the use of the roadway by the individual plaintiffs was not distinguishable from similar use by the public generally, but it was relevant to prove that the road was a public roadway. The determination that the road had become a public thoroughfare precluded a ruling in plaintiffs' favor on the issue of the establishment of a prescriptive easement.

The judgment of the lower court is affirmed as to the establishment of a public thoroughfare but reversed as to the acquisition by the plaintiffs of prescriptive rights therein. Costs to respondents.

MAUGHAN, C. J., and HALL and STEWART, JJ., concur.

CROCKETT, J., heard the arguments, but retired before the opinion was filed.

WELLS FARGO ARMORED SERVICE CORPORATION, Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF UTAH, Milly O. Bernard, Chairman, David R. Irvine and Kenneth Rigtrup, Commissioners of the Public Service Commission of Utah, and Brinks, Inc., Defendants.

No. 16862.

Supreme Court of Utah.

Feb. 11, 1981.

Review was sought from order of the Public Service Commission granting an armored car company an exemption from regulation by Commission. The Supreme Court, Stewart, J., held that restriction in statute governing exemptions for certain motor vehicles from regulation by Commission limiting exemption of certain vehicles to those operating within a 15-mile radius of limits of any city or town did not apply to armored cars.

Affirmed.

Hall, J., dissented and filed opinion.

1. Statutes ⇐219(1)

While it is always ultimate responsibility of Supreme Court to interpret terms of a statute to effectuate legislative intent, some deference is due interpretation of a statute placed on it by administrative agency which has responsibility for administering that statute.

2. Automobiles ⇐78

Restriction in statute governing exemptions of certain motor vehicles from regulation by Public Service Commission limiting exemption of certain vehicles to those operating within a 15-mile radius of limits of any city or town did not apply to armored cars. U.C.A.1953, 54-6-12(f).

Mark K. Boyle, Salt Lake City, for plaintiff.

Robert B. Hansen, Atty. Gen., Arthur A. Allen, Jr., Asst. Atty. Gen., Calvin L. Rampton, Salt Lake City, for Brinks.

James S. Lowrie, Gregg I. Alvord, Salt Lake City, for defendants.

STEWART, Justice:

This is a review of the Public Service Commission's order granting Brink's, Inc., an exemption from regulation by the Commission. The exemption is claimed pursuant to § 54-6-12(f), Utah Code Ann. (1953), as amended, which provides that the requirements of Chapter 6, Title 54, U.C.A. 1953, do not apply:

To motor vehicles when especially constructed for towing, wrecking, maintenance, or repair purposes, and not otherwise used in transporting goods and merchandise for compensation; or when constructed as armored cars and used for the safe conveyance or delivery of money or other valuables, or when used as hearses, ambulances, or licensed taxicabs, operating within a fifteen mile radius of the limits of any city or town; or to motor vehicles used as ambulances or hearses by any person, firm or corporation duly licensed in the state as an embalmer, funeral director, or as a mortuary establishment, provided that use of such motor vehicles as an ambulance shall be incidental to the use of embalming or funeral directing.

Brinks, an armored car company, argues that the subsection is unclear as to the types of motor vehicles included within the fifteen mile restriction, but proposes that rules of statutory and grammatical construction limit the fifteen mile provision to hearses, ambulances and taxicabs. Plaintiff Wells Fargo Armored Service Corporation, which filed with the Commission a motion to dismiss the application for exemption, argues that the statute is clear and that the restriction applies to armored cars as well. It is noteworthy, however, that Wells Fargo had, in an earlier appearance before the Commission, contended that the statute was unclear.

The Commission in this case reached the conclusion that the meaning of subsection (f) was ambiguous. To resolve the ambiguity, the Commission applied the "last antecedent" rule and determined that the fifteen mile restriction applied only to hearses, ambulances, and taxicabs. Accordingly, Brinks was granted a statewide exemption.

[1] We certainly do not dispute the Commission's conclusion that subsection (f) is ambiguous. The use of the comma directly following the word "valuables" results in a less than clear meaning as to the restriction under review. Of course it is always the ultimate responsibility of this Court to interpret the terms of a statute to effectuate legislative intent. Nevertheless, some deference is due interpretation of a statute placed on it by the administrative agency which has the responsibility for administering that statute. In *Colman v. Utah State Land Board*, 17 Utah 2d 14, 19, 403 P.2d 781, 784 (1965), this Court stated:

> [B]ecause of its experience and presumed expert knowledge in its field, an administrative interpretation and application of a statute, although not necessarily controlling, is generally regarded as prima facie correct and not to be overturned so long as it is in conformity with the general objectives the agency is charged with carrying out, and there is a rational basis for it in the provisions of law. [Footnote omitted]

See also *Kennecott Copper Corp. v. Anderson*, 30 Utah 2d 102, 514 P.2d 217 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

This is not to say that this Court will automatically approve administrative constructions, *Lake Shore Motor Coach Lines, Inc. v. Welling*, 9 Utah 2d 114, 117, 339 P.2d 1011, 1013 (1959). The Court stated in *McPhie v. Industrial Commission*, Utah, 567 P.2d 153, 155 (1977):

> The time honored rule of law is that the construction of statutes by governmental agencies charged with their administration should be given considerable weight—however, if it is made clearly to appear that a statute has been misconstrued or misapplied it is the duty of the court to correct the same. [Footnote omitted.]

[2] The words of the statutory provision and the statutory policy embodied therein assist in ascertaining that meaning. Resort to principles of statutory construction provide some guidance in the endeavor. In reaching its conclusion, the Commission relied on the "last antecedent" rule of statutory construction. The rule provides in general terms that when there is a modifier following a series of nouns, the modifier will apply only to the immediately prior antecedent, which in this case has the effect of excluding armored vehicles from regulation. In addition, the Commission concluded that armored cars were not subject to

regulation because: (1) the operation of an armored car service is of a fundamentally different character than that of hearses, ambulances or taxicabs; (2) the potential customers of armored car services are in a strong bargaining position vis-a-vis those services; and (3) the fifteen mile radius limitation makes more sense in the case of hearses, ambulances and taxicabs, as those carriers are frequently the subject of regulation by local jurisdictions. The result reached by the Commission is not erroneous.

The order of the Public Service Commission is affirmed.

No costs awarded.

CROCKETT, J.,* and R. L. TUCKETT, Retired Justice, concur.

MAUGHAN, C. J., does not participate herein; R. L. TUCKETT, Retired Justice, sat.

WILKINS, J., heard the arguments but resigned before the opinion was filed.

HALL, Justice: (dissenting).

The statute in question [1] exempts from regulation

> . . . motor vehicles when specially constructed . . .; or when constructed as armored cars and used for the safe conveyance or delivery of money or other valuables, or when used as hearses, ambulances, or licensed taxicabs, operating within a fifteen mile radius of any city or town;
>
> . . . . .

I am of the opinion that application of the so-called "last antecedent" rule to the foregoing statutory phrase serves to subvert rather than to clarify the Legislature's intent in its enactment.[2]

Notwithstanding any distinction the Commission or this Court might draw between armored cars, hearses, ambulances and taxicabs, the unalterable fact remains that the Legislature, whose prerogative it is, has not seen fit to do so. On the contrary, the statute sets forth the vehicles in a single phrase, in series, separated only by commas, and thus categorizes them as a single class. Had it been the intention of the Legislature to separately categorize armored cars, its insertion of a semicolon, rather than a comma, following the recitation thereof would then have conveyed such an intent.

It is not the prerogative of this Court to presume error in legislative enactments, nor to distort or defeat the intent of legislation by altering the punctuation contained therein. Particularly is this so when, as here, a reasonable basis exists to interpret the act as drafted. Yet, the main opinion presumes such error, and imposes its own punctuation in order to sustain the Commission's order.[3]

In addition, it is to be observed that the Commission is charged with the duty of regulating all common carriers.[4] Consequently, any ambiguity found to exist in any exempting provisions [5] are to be reconciled in favor of the general policy it is to regulate. In the face of ambiguity as to exemption, it appears the better judicial course would be to decide in favor of the expressed mandate of regulation rather than an unclear exemption.

I would vacate the order of the Commission which grants a statewide exemption to Brinks, Inc.

* CROCKETT, J., concurred in this case before his retirement.

1. U.C.A.1953, 54-6-12(f).

2. The rule has apparently never been applied in this jurisdiction, but its applicability, under appropriate circumstances, was discussed in *Salt Lake City v. Salt Lake County*, Utah, 568 P.2d 738 (1977).

3. It is of note that such order represents a complete departure from prior statutory interpretation since at all times prior hereto the Commission has required the regulation of armored cars, and plaintiff herein is presently so regulated.

4. U.C.A.1953, 54-6-2 and 54-6-4.

5. Supra, footnote 1.

MEL TRIMBLE REAL ESTATE, and Cal Florence, Plaintiffs and Appellants,

v.

Leland A. FITZGERALD, Defendant and Respondent.

No. 16746.

Supreme Court of Utah.

Feb. 13, 1981.

Broker and sales agent brought action against purchaser for real estate sales commission. The Third District Court, Salt Lake County, Bryant H. Croft, J., entered judgment in favor of purchaser, and plaintiffs appealed. The Supreme Court, Harding, District Judge, held that: (1) in case in which earnest money agreement between vendor and purchaser provided "Buyer to be responsible for all real estate commissions," instruction given by the court fairly and adequately covered the contentions of the parties as they were presented to the court, and there was no error in refusing to give requested instruction on theory that broker was a third-party beneficiary in earnest money agreement, and (2) issues as to sales commission claimed by broker and whether there should have been any sales commission at all were for the jury.

Affirmed.

1. Contracts ⇐187(1)

It is essential for a third-party beneficiary claimant to prove that contract was intended to benefit him directly; one incidentally benefited by performance of a promise to a third person may not maintain an action against the promissor.

2. Contracts ⇐187(1)

Terms of agreement and facts circumstances that surround its making can be examined to determine whether supposed third-party beneficiary of contract was in fact intended to be such.

3. Brokers ⇐88(7)

In action against purchaser for r estate sales commission in case in wh earnest money agreement between ven and purchaser provided "Buyer to be sponsible for all real estate commissio instruction given by the court fairly adequately covered the contentions of parties as they were presented to the co and there was no error in refusing to g requested instruction on theory that bro was a third-party beneficiary in earr money agreement.

4. Brokers ⇐88(1)

In action by broker and sales ag against purchaser for real estate sales c mission, issues as to sales commis claimed by broker and whether there sh be any sales commission at all were for jury.

Robert J. DeBry and Dale F. Gardi Salt Lake City, for plaintiffs and ap lants.

Lawrence E. Corbridge, Salt Lake C for defendant and respondent.

HARDING, District Judge:

This appeal is from an adverse judgm on a claim for a real estate sales com sion.

Appellants were in the business of sel real estate. Mel Trimble was a lice real estate broker, and Cal Florence employed by Trimble as a sales agent. appellants will be referred to herein joi as Florence.

The ranch property involved in this ac is located in Cedar Valley, Utah, and under the management and control of lace Ohran. Respondent Leland A. Fitz ald was a rancher.

Two or three years prior to Decem 1977, Florence allegedly obtained an listing from Ohran to sell the ranch pro ty. The terms of the oral listing allo Florence to seek offers, and if any was accepted by Ohran, a six percent mission would be paid on the sale.

ter statute because the killing proscribed under that provision must be "*intentional.*" *Id.* at 94 (emphasis added). We again noted that "one cannot be guilty of an attempt to commit a crime unless the necessary mens rea of the completed crime is *intentional* conduct." *Id.* at 94 n. 1 (emphasis added).[5]

At bottom, the State seeks to replace the word "intent" in paragraph (2) of the attempt statute with, as it says, "intent *or* a mental state that is equivalent thereto" and to modify or reject the holdings of *Bell, Norman,* and *Howell.* Although it may make sense to allow attempt for homicide offenses that are presumably equal in culpability to intentional murder, we believe that the most reasonable approach, in light of the statutory language and our cases, is to read the word "intent" in paragraph (2) of the attempt statute as that word is defined in section 76–2–103(1).

Clarity is crucial to a just criminal law system. Jurors are instructed to apply the language set forth in our penal statutes to determine criminal liability. Articulating the various mental states required for the various crimes in the Code is difficult enough without giving multiple meanings to the word "intent."

We hold that to convict a defendant of attempted second degree murder, the prosecution must prove that the defendant had a conscious objective or desire to cause the death of another. Because the mental state required for depraved indifference homicide falls short of that intent, the crime of attempted depraved indifference homicide does not exist in Utah.

The order of the trial court denying Vigil's motion to dismiss and amend is reversed.

HALL, C.J., HOWE, Associate C.J., and STEWART and DURHAM, JJ., concur.

5. In *State v. Maestas,* 652 P.2d 903 (1982), we rejected an argument that the Utah attempt statute required a higher level of "intent" than that required for first degree murder. In so holding, we interpreted paragraph (1) of the Utah attempt statute as making "clear that regardless of any requirements which the common law may impose concerning 'attempt' crimes, Utah law requires only 'the kind of culpability otherwise required for the commission of the [completed] offense.'" *Id.* at 904 (brackets in original) (quoting Utah Code Ann. § 76–4–101(1) (1953)). Alternatively, we wrote that even if the Utah attempt statute incorporated the common law requirement of intent, the mental state required for first degree murder was sufficient to meet that requirement. *Id.* at 905.

The first alternative rationale relied on in *Maestas* is clearly inconsistent with our cases in *Bell, Howell,* and *Norman* and with our holding in the instant case. Thus, that portion of *Maestas* that conflicts with these cases and today's holding is incorrect. However, we note that *Maestas* is still good law insofar as it authorizes prosecution for attempted aggravated murder under the intentional or knowing formulation of section 76–5–202(1) or attempted murder under the intentional or knowing formulation of section 76–5–203(1)(a).

Larry J. ZISSI, Petitioner,

v.

STATE TAX COMMISSION OF UTAH, Respondent.

No. 900317.

Supreme Court of Utah.

Oct. 27, 1992.

Taxpayer sought writ of review of decision of State Tax Commission assessing $44,000 in penalties and taxes under Illegal Drug Stamp Tax Act. The Supreme Court, Zimmerman, J., held that: (1) "dosage unit," within meaning of Act, means one tablet or pill, not the dose actually taken by each different drug user; (2) Act did not violate Utah's constitutional provision requiring uniform operation of the laws; (3) to conform to Fifth Amendment's privilege against self-incrimination, Act must be read to preclude prosecutors from using any information gained as result of stamp purchaser's compliance with Act to establish link in chain of evidence in subsequent drug prosecution; (4) Act did not inflict excessive fine or forfeiture in violation of Eighth Amendment's prohibition of cruel and unusual punishment; and (5) amphetamines seized from taxpayer's truck following unconstitutional roadblock stop were inadmissible.

Reversed.

Howe, Associate C.J., filed opinion concurring in part and dissenting in part in which Hall, C.J., concurred.

1. Administrative Law and Procedure ⇐749

Party appealing from order of administrative agency bears burden of demonstrating that agency's factual determinations are not supported by substantial evidence, and thus Supreme Court states facts and all legitimate inferences drawn therefrom in light most favorable to agency's findings. U.C.A.1953, 63–46b–16(4)(g).

2. Administrative Law and Procedure ⇐791

Utah Administrative Procedures Act (UAPA) requires Supreme Court to uphold agency's factual findings if they are supported by substantial evidence based upon record as a whole. U.C.A.1953, 63–46b–16(4)(g).

3. Administrative Law and Procedure ⇐796

On appeal from determination of administrative agency, issues of law are reviewed by Supreme Court for correctness under Utah Administrative Procedures Act (UAPA). U.C.A.1953, 63–46b–16(4)(d).

4. Taxation ⇐1319

On review of State Tax Commission's assessment of $44,000 in penalties and taxes under Illegal Drug Stamp Tax Act, Supreme Court would not apply standard of intermediate deference to legal issues, where there was no explicit delegation of discretion, and issues were questions of constitutional law and statutory construction on which Commission's experience and expertise would be of no real assistance. U.C.A.1953, 59–19–101 to 59–19–107.

5. Taxation ⇐1317

State Tax Commission's factual finding that amphetamine tablets were sold by the pill and not by weight was not contrary to substantial weight of evidence, for purpose of Illegal Drug Stamp Tax Act, which establishes different tax rates for drugs sold by weight and drugs sold by dosage unit. U.C.A.1953, 59–19–103.

6. Statutes ⇐205

General rule of statutory construction is that statute should be construed as comprehensive whole.

7. Statutes ⇐212.6

In construing legislative enactments, Supreme Court assumes that legislature used each term in statute advisedly and, thus, that Court should read statutory words literally and in accordance with their usually accepted meanings.

8. Taxation ⇐1291

"Dosage unit," within meaning of Illegal Drug Stamp Tax Act, which imposes $2,000 tax on each 50 "dosage units" of controlled substance that is not sold by weight or portion thereof, means one tablet or pill, not the dose actually taken by each different drug user. U.C.A.1953, 59–19–103.

See publication Words and Phrases for other judicial constructions and definitions.

9. Statutes ⇐47

Statute will be found to be unconstitutionally vague on its face only when it is insufficiently explicit and clear to inform the ordinary reader of common intelligence what conduct is proscribed.

10. Statutes ⇐47

Test for determining whether statute is unconstitutionally vague is applied in light of fact that exactitude of language is seldom possible.

11. Statutes ⇐47

Statute will not be invalidated for vagueness if any sensible, practical effect can be given to contested statutory terms.

12. Taxation ⇐1291

Term "dosage unit," within meaning of Illegal Drug Stamp Tax Act, which imposes $2,000 tax on each 50 "dosage units" of controlled substance that is not sold by weight or portion thereof, was not unconstitutionally vague on its face, despite lack of statutory definition. U.C.A.1953, 59–19–103; U.S.C.A. Const.Amend. 14.

13. Constitutional Law ⇐48(1)

Party challenging constitutionality of statute bears burden of demonstrating its invalidity.

14. Taxation ⇐42(1)

In tax, as in other areas of purely economic regulation, Supreme Court grants broad deference to legislature when scrutinizing reasonableness of legislative classifications and their relationship to legitimate legislative purposes.

15. Taxation ⇐1213

Distinctions in Illegal Drug Stamp Tax Act's definition of "dealer" as anyone who manufactures, produces, ships, transports, or imports into Utah or in any manner acquires or possesses more than 42½ grams of marijuana, or seven or more grams of any controlled substance, or ten or more dosage units of any controlled substance which is not sold by weight, were not patently unreasonable, for purpose of determining whether Act violated Utah constitutional provision requiring uniform operation of the laws. Const. Art. 1, § 24; U.C.A.1953, 59–19–102(2).

16. Taxation ⇐1213

Illegal Drug Stamp Tax Act's classification of dealers depending on types of drugs they possess was reasonable, for purpose of determining whether Act violated Utah's constitutional provision requiring uniform operation of the laws. Const. Art. 1, § 24; U.C.A.1953, 59–19–101 to 59–19–107.

17. Taxation ⇐1213

Illegal Drug Stamp Tax Act reasonably taxed tablet amphetamines based upon dosage unit, while taxing tablets ground into powder form at lower rate for drugs sold by weight, for purpose of determining whether Act violated Utah's constitutional provision requiring uniform operation of the laws. Const. Art. 1, § 24; U.C.A.1953, 59–19–101 to 59–19–107.

18. Taxation ⇐1213

Raising revenue and discouraging illegal drug trafficking were legitimate legislative purposes, for purpose of determining whether Illegal Drug Stamp Tax Act violated Utah's constitutional provision requiring uniform operation of the laws. Const. Art. 1, § 24; U.C.A.1953, 59–19–101 to 59–19–107.

19. Constitutional Law ⇐209

Under Utah's constitutional provision requiring uniform operation of the laws, if relationship of classification to statutory objectives is unreasonable, the discrimination is unreasonable. Const. Art. 1, § 24.

20. Constitutional Law ⇐228.5
Taxation ⇐1213

Imposing heavy tax on controlled substances was not unreasonable means of achieving ends of raising revenue and inhibiting drug trafficking, and therefore Illegal Drug Stamp Tax Act did not violate Utah's constitutional provision requiring uniform operation of the laws. Const. Art. 1, § 24; U.C.A.1953, 59–19–101 to 59–19–107.

21. Constitutional Law ⇐228.5
Taxation ⇐1213

Illegal Drug Stamp Tax Act did not violate Fourteenth Amendment's equal protection clause, despite its distinctions based upon quantity of drugs possessed by dealers, form of drugs possessed by dealers, and manner in which those drugs were sold. U.S.C.A. Const.Amend. 14; U.C.A. 1953, 59–19–101 to 59–19–107.

22. Taxation ⇐1319

Supreme Court would not address whether Illegal Drug Stamp Tax Act violated privileges against self-incrimination granted in Utah Constitution, where taxpayer failed to argue issue under Utah Constitution, mentioning it only off-handedly in his brief. Const. Art. 1, § 12; U.C.A. 1953, 59–19–101 to 59–19–107.

23. Witnesses ⇐297(8)

Illegal Drug Stamp Tax Act's provisions violated Fifth Amendment privilege against self-incrimination, since purchaser would reasonably suppose that compliance would make information available to prosecuting authorities and that information would provide "link in a chain" of evidence that would tend to establish purchaser's guilt of drug-related offenses. U.S.C.A. Const.Amend. 5; U.C.A.1953, 59–19–101 to 59–19–107.

24. Constitutional Law ⇐48(3)

Supreme Court has power to uphold an otherwise questionable statute by tailoring it to conform to Constitution.

25. Constitutional Law ⇐48(4)
Taxation ⇐1212

To conform to Fifth Amendment's privilege against self-incrimination, Illegal Drug Stamp Tax Act had to be read to preclude prosecutors from using any information gained as result of stamp purchaser's compliance with Act to establish link in chain of evidence in subsequent drug prosecution. U.S.C.A. Const.Amend. 5; U.C.A. 1953, 59–19–101 to 59–19–107.

26. Criminal Law ⇐1214

Illegal Drug Stamp Tax Act did not inflict excessive fine or forfeiture in violation of Eighth Amendment's prohibition of cruel and unusual punishment, where taxpayer failed to demonstrate that penalty is not commensurate with the social and economic harm caused by illegal drug use, statute's 100% penalty is not unique in Utah law, and same taxes and penalties were imposed in other states. U.S.C.A. Const.Amend. 8; U.C.A.1953, 59–19–101 to 59–19–107.

27. Taxation ⇐1319

Supreme Court would only address whether Illegal Drug Stamp Tax Act violated Eighth Amendment's prohibition of cruel and unusual punishment, and would not address whether fine or forfeiture imposed under Act violated State Constitution, where taxpayer cited no authority and made no separate cruel and unusual punishment argument under State Constitution. U.S.C.A. Const.Amend. 8; U.C.A. 1953, 59–19–101 to 59–19–107.

28. Taxation ⇐1319

State had burden to justify roadblock stop once taxpayer challenged its constitutionality in proceeding before State Tax Commission regarding imposition of penalties and taxes under Illegal Drug Stamp Tax Act, and therefore State's failure to justify stop waived State's right to argue legality of stop, and Supreme Court had to accept for purposes of appeal that stop was an unconstitutional seizure that invalidated subsequent search of taxpayer's vehicle. U.C.A.1953, 59–19–101 to 59–19–107.

29. Taxation ⇐1315

In determining penalties and taxes under Illegal Drug Stamp Tax Act, State Tax Commission improperly admitted into evidence amphetamines that were seized from taxpayer's truck as result of search following unconstitutional roadblock stop. U.C.A.1953, 59–19–101 to 59–19–107.

30. Taxation ⇐1319

State Tax Commission's error in admitting into evidence amphetamines seized from taxpayer's truck in search following unconstitutional roadblock stop was clearly harmful, since Commission premised tax and penalties under Illegal Drug Stamp Tax Act on the drugs themselves. U.C.A. 1953, 59–19–101 to 59–19–107.

David J. Bird, Salt Lake City, for Zissi.

R. Paul Van Dam, Leon A. Dever, Salt Lake City, for Tax Com'n.

ZIMMERMAN, Justice:

Petitioner Larry J. Zissi seeks a writ of review of a decision of the State Tax Commission. The Commission assessed $44,000 in penalties and taxes against Zissi, finding that he had failed to pay the taxes that Utah's Illegal Drug Stamp Tax Act ("the Stamp Act") imposes on the purchase, acquisition, transportation, or importation of controlled substances. *See* Utah Code Ann. §§ 59–19–101 to –107. Before this court, Zissi challenges the Commission's fact-finding and its construction of the Stamp Act, the constitutionality of the Stamp Act, and the constitutionality of the

roadblock at which sheriff's deputies found the controlled substances giving rise to the taxes and penalties Zissi argues that because the roadblock stop amounted to an unconstitutional seizure, the exclusionary rule should have prevented the Commission from admitting in evidence the approximately 550 amphetamine tablets the deputies had seized from his truck

We hold as follows first, that Zissi has not shown that the Commission's fact finding was against the substantial weight of the evidence, second, that the Commission properly construed the Stamp Act, third, that the Stamp Act survives Zissi's constitutional challenges, fourth, that the roadblock stop and subsequent search of Zissi's truck violated the Utah Constitution, and fifth, that the exclusionary rule barred the admission of the amphetamine tablets at the Commission hearing Because the Commission should not have admitted the illegally seized amphetamine tablets in evidence, we reverse its decision

[1] We first state the facts Because a party appealing from an order of an administrative agency bears the burden of demonstrating that the agency's factual determinations are not supported by substantial evidence, *see id* § 63-46b-16(4)(g), we state the facts and all legitimate inferences drawn therefrom in the light most favorable to the agency's findings *Cf First Nat'l Bank of Boston v County Bd of Equalization of Salt Lake County*, 799 P 2d 1163, 1165 (Utah 1990) We state the facts in this case accordingly

On June 4, 1988, Zissi's pickup truck was stopped at a roadblock set up by the Utah County Sheriff on State Road 73 outside Fairfield, Utah While Zissi was at the roadblock, one of the officers detected a strong odor of marijuana coming from the truck The officers directed Zissi to pull over to the side of the road They then inquired whether he had any marijuana in his vehicle After initially denying that he did, Zissi produced a small plastic bag of marijuana and a marijuana cigarette he had been smoking The officers then searched his truck and found a shaving bag and a briefcase behind the seat The shaving bag contained approximately 550 amphetamine tablets, and the briefcase contained $24 440 Zissi pleaded no contest to criminal charges brought against him as a result of the roadblock and subsequent search

After the Utah County Sheriff s office advised the Commission of the arrest, the Commission began proceedings against Zissi for taxes and penalties due under the Stamp Act The Stamp Act taxes controlled substances and requires dealers to affix official stamps on the controlled substances as evidence of taxes paid [1] *See* Utah Code Ann § 59-19-104(2) Zissi's amphetamines did not bear the official stamp At a hearing before the Commission, Zissi argued that the search of his truck was unconstitutional and that the evidence of his amphetamines should be suppressed Stating that it did not have the authority to determine the constitutionality of the search, the Commission admitted the amphetamines in evidence and assessed a tax of $22,000 on the drugs and a penalty of $22,000 for Zissi's failure to pay the drug taxes and affix the official stamps to the amphetamines

[2-4] Before discussing Zissi's challenges to the Commission's ruling, we note the appropriate standard of review The Utah Administrative Procedures Act ("UAPA"), *id* §§ 63-46b-1 through -22, governs our review of Commission decisions *See id* § 63-46b-1(1), *Savage Indus, Inc v Utah State Tax Comm'n*, 811 P 2d 664, 668-69 (Utah 1991) Zissi challenges one of the Commission's factual determinations The UAPA requires us to uphold an agency's factual findings if such findings are supported by substantial evidence based upon the record as a whole *See* Utah Code Ann § 63-46b-16(4)(g) Zissi's remaining claims raise issues of law, which we review for correctness under the

1 Amphetamines are included within the statutory definition of controlled substances *See* Utah Code Ann §§ 58-37 2(4) -4(2)

UAPA [2] *See id* § 63-46b-16(4)(d), *Savage Indus, Inc*, 811 P 2d at 669-70 We now turn to the merits

[5] We begin with Zissi's argument that the Commission erred in making a factual finding that amphetamine tablets are drugs that are sold by the pill and not by weight This finding is significant because the Stamp Act prescribes different tax rates for drugs sold by weight and drugs sold by "dosage unit" [3] Utah Code Ann § 59-19-103

In finding that the drugs in Zissi's possession are sold by the pill and not by weight, the Commission relied on the following evidence The Commission heard testimony by Detective Kendra Hurlin of the Salt Lake County Sheriff's Department that amphetamines in pill form are sold by the pill Loni Deland, a defense witness and a former narcotics agent for the State of Utah, testified that amphetamines generally are sold as a powder, by weight However, Deland also testified that he had not seen amphetamines in pill form sold by weight After reviewing this testimony, we cannot say that the Commission's finding that amphetamine tablets are sold by the pill was contrary to the substantial weight of the evidence, which we have defined as that quantum of relevant evidence that would tend to convince a reasonable person of a conclusion *First Nat'l Bank of Boston*, 799 P 2d at 1165, *Grace Drilling Co v Board of Review*, 776 P 2d 63, 68 (Utah Ct App 1989) Consequently, we affirm the Commission s factual conclusion

We next examine Zissi s argument that the Commission misconstrued the meaning of the term "dosage unit," as used in the Stamp Act The Stamp Act itself does not define this term [4] The Commission construed it to mean one tablet or pill, basing its determination on expert testimony by J Craig Johnson, director of Pharmacy Services at LDS Hospital Johnson testified that "dosage unit" has a distinct meaning in medical circles, a meaning that differs from the meaning of the term "dosage" He said that "dosage unit" means the amount of a medicine or prescription that is sold as a unit and relates to how the medicine is packaged This differs from the dosage a patient takes, which may be one dosage unit or more than one dosage unit, depending on the strength of the patient s prescription

[6, 7] Zissi argues that because the actual dosage taken by users of amphetamines is generally greater than one pill,

2. Our recent decisions recognize that we should grant intermediate deference to an agency s interpretation or application of specific laws when the legislature has explicitly or implicitly delegated discretion to the agency to interpret or apply that law *See, e g, Morton Int'l, Inc v Auditing Div of Utah State Tax Comm'n*, 814 P 2d 581 589 (Utah 1991), *Savage Indus, Inc*, 811 P 2d at 668 In the instant case, there is no explicit delegation of discretion, and the issues are questions of constitutional law and statutory construction on which the Commission s experience and expertise will be of no real assistance *See Sandy City v Salt Lake County*, 827 P 2d 212, 218 (Utah 1992), *Silver v Auditing Div of State Tax Comm'n*, 820 P 2d 912, 914 (Utah 1991) Therefore we do not apply the standard of intermediate deference to the legal issues in this case *See Silver*, 820 P 2d at 914

3 The Stamp Act states in relevant part

(1) A tax is imposed on marihuana and controlled substances as defined in this chapter at the following rates

(b) on each gram of a controlled substance or each portion of a gram $200 and

(c) on each 50 dosage units of a controlled substance that is not sold by weight or portion thereof $2000

(2) For the purpose of calculating the tax under this chapter a quantity of marihuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute or by dosage units when the substance is not sold by weight in the dealer s possession

Utah Code Ann § 59 19 103

4 Although the statute contains no definition of the term dosage unit it does authorize the Commission to adopt the rules necessary to enforce the Stamp Act *See* Utah Code Ann § 59 19-107(1) However the Commission has never exercised this rule making power

the Commission's determination that a dosage unit equals one pill is erroneous. Essentially, Zissi would have this court equate "dosage" with "dosage unit." This argument ignores the word "unit" in the term. A general rule of statutory construction is that a statute should be construed as a comprehensive whole. *See Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1045 (Utah 1991); *Peay v. Board of Ed. of Provo City School Dist.*, 14 Utah 2d 63, 66, 377 P.2d 490, 492 (Utah 1962). In construing legislative enactments, we assume that the legislature used each term in the statute advisedly and, thus, that we should read the statutory words literally and in accordance with their usually accepted meanings. *See Pate v. Marathon Steel Co.*, 777 P.2d 428, 430 (Utah 1989); *Hector, Inc. v. United Sav. & Loan Ass'n*, 741 P.2d 542, 546 (Utah 1987); *Grant v. Utah State Land Bd.*, 26 Utah 2d 100, 102, 485 P.2d 1035, 1036 (1971).

While Zissi correctly points out that the term "dosage" is generally understood to be the amount of drug a person would take, he does not address the meaning of the word "unit" in the term "dosage unit." "Unit," as defined by Webster's Dictionary, means

> the first natural number: a number that is the least whole number and is expressed by the numeral 1: a *single thing* (as a magnitude or number) that constitutes an undivided whole . . .: a determinate quantity (as of length, time, heat, value or housing) adopted as a standard of measurement for other quantities of the same kind . . .: *a single thing* or person or group *that is a constituent and isolable member of some more inclusive whole:* a member of an aggregate that is *the least part to have clearly definable separate existence* and that normally forms a basic element of organization within the aggregate. . . .

Webster's Third New International Dictionary 2500 (1961) (emphasis added).

[8] When read in conjunction with "dosage," it is apparent that the word "unit" in "dosage unit" relates to a single item or measurement used to determine the patient's actual dosage. The Commission's construction of the term "dosage unit" takes this definition of unit into account in determining that a dosage unit is one pill. The language of the statute and the evidence that "dosage unit" has a distinct meaning in the medical community amply support the Commission's definition of "dosage unit" as a unit of the drug. In this case, that unit is one pill. We therefore affirm the Commission's interpretation of "dosage unit."

Having rejected Zissi's challenges to the Commission's fact-finding and statutory construction, we next turn to his attacks on the constitutionality of the Stamp Act. First, Zissi argues that the Stamp Act violates Fourteenth Amendment due process guarantees because it is unconstitutionally vague on its face. Specifically, he argues that the term "dosage unit" in the statute is vague and indefinite and subject to arbitrary enforcement by the Commission and the prosecuting authorities charged with enforcing the Stamp Act because the term does not provide fair notice of what is required or prohibited and does not protect against unfettered discretion in enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); *State v. Fontana*, 680 P.2d 1042, 1049 (Utah 1984); *Greaves v. State*, 528 P.2d 805, 807 (Utah 1974); *State v. Packard*, 122 Utah 369, 250 P.2d 561, 564 (1952).

[9–11] We will find a statute to be unconstitutionally vague on its face only when it is insufficiently explicit and clear to inform the ordinary reader of common intelligence what conduct is proscribed. *See Greenwood v. City of North Salt Lake*, 817 P.2d 816, 819 (Utah 1991); *Chris & Dick's Lumber v. Tax Comm'n*, 791 P.2d 511, 516 (Utah 1990); *Packard*, 250 P.2d at 563. We apply this test in light of the fact that exactitude of language is seldom possible. Consequently, we will not invalidate a statute for vagueness if any sensible, practical effect can be given to the contested statutory terms. *Packard*, 250 P.2d at 563; *see State v. Musser*, 118 Utah 537, 223 P.2d 193, 194 (1950).

[12] With this standard in mind, we examine Zissi's interpretation of the statute. He argues that the term "dosage unit" means the number of pills or units of a drug that a user purchases and uses at one time and that therefore the statute is vague and not readily susceptible of equal enforcement and operation. He claims that dealers who desire to comply with the statute's mandate that they pay tax on and purchase stamps for all drugs in their possession are required to make a prior assessment of what the Commission later will determine makes up a dosage unit.

Zissi's argument cannot survive our holding that "dosage unit" means one tablet or pill, not the dose actually taken by each different drug user. Thus interpreted, the term "dosage unit" within the statute meets the requirements for specificity and notice of the required conduct. Dealers are made aware that they will be required to buy stamps based upon each pill in their possession. We reject Zissi's argument that the Stamp Act is unconstitutionally vague on its face.

We next address Zissi's contention that the Stamp Act violates both federal and state guarantees of equal protection. The Utah Constitution states, "All laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. We have previously determined that article I, section 24 imposes an analysis of the reasonableness of economic legislation that is at least as rigorous as the analysis required by the federal equal protection clause and may require even stricter scrutiny than does the federal Constitution. *See Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989); *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988); *see also Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984). Therefore, our analysis begins with Utah's constitutional provision requiring uniform operation of the laws. If the tax statute at issue withstands scrutiny under the Utah Constitution, we need not examine the federal equal protection question. *See Blue Cross*, 779 P.2d at 637.

[13, 14] As a threshold matter, we note that our analysis is guided by the well-settled proposition that the party challenging a statute bears the burden of demonstrating its invalidity. *See, e.g., Blue Cross*, 779 P.2d at 637; *City of West Jordan v. Utah State Retirement Bd.*, 767 P.2d 530, 537 (Utah 1988); *Baker v. Matheson*, 607 P.2d 233, 236 (Utah 1979). In tax, as in other areas of purely economic regulation, we grant broad deference to the legislature when scrutinizing the reasonableness of legislative classifications and their relationship to legitimate legislative purposes. *See Blue Cross*, 779 P.2d at 637; *City of West Jordan*, 767 P.2d at 537. "That broad deference leads us to sustain a classification if 'facts can reasonably be conceived which would justify the distinctions or differences in state policy [expressed by the challenged legislation] as between different persons.'" *Blue Cross*, 779 P.2d at 637 (quoting *Baker*, 607 P.2d at 244).

Bearing in mind this broad deference, we analyze the Stamp Act to see whether it violates article I, section 24. "In scrutinizing a legislative measure under article I, § 24, we must determine whether the classification is reasonable, whether the objectives of the legislative action are legitimate, and whether there is a reasonable relationship between the classification and the legislative purposes." *Id.* Before turning to these issues, we must identify what classifications the legislature has made in imposing the Drug Stamp Tax. First, the Stamp Act imposes a tax on those who deal in illegal drugs. The definition of "dealers" in the Stamp Act is based upon the quantity of drugs possessed. Utah Code Ann. § 59–19–102(2). Second, the Stamp Act breaks "dealers" into subgroups that are taxed at different rates, depending on the form of the drugs possessed by the dealer and the manner in which these drugs are sold. *See id.* § 59–19–103. Hence, the statute distinguishes between dealers possessing drugs sold by weight and those possessing drugs not sold by weight.

[15] Now that we have identified the statute's classifications, we analyze their legitimacy The first question is whether there is anything inherently unreasonable in the legislature's classifications of drug dealers *See Blue Cross*, 779 P 2d at 640 The statute defines a dealer as anyone who "manufactures, produces, ships, transports, or imports into Utah or in any manner acquires or possesses more than 42½ grams of marihuana, or seven or more grams of any controlled substance, or ten or more dosage units of any controlled substance which is not sold by weight" Utah Code Ann § 59–19–102(2) On their face, these distinctions are not patently unreasonable Indeed, it makes perfect sense that the legislature would impose the tax on only those persons who possess a significant quantity of a controlled substance Unlike casual users, who possess only small quantities of drugs, such persons are more likely to be major participants in the drug trafficking that creates such a drain on government resources

[16] Moreover, the classification of dealers depending on the types of drugs they possess is also reasonable Controlled substances are sold in different forms The classifications are a necessary concession to this fact and do not single out any member of a particular class for disparate treatment All drugs sold by weight are taxed at the same rate Likewise, all drugs sold in units are taxed at the same rate *See id* § 59 19–103(1)(c)

[17] Zissi maintains that because the tablet amphetamines might well have been ground into powder form and thus taxed at the lower rate for drugs sold by weight, he is being discriminated against unreasonably However, he fails to address the fact that an amphetamine sold in powder form is a distinctly different substance than an amphetamine sold in tablet form The evidence before the Commission distinguished between amphetamine tablets, which characteristically are of an off white, brownish color, and crystal amphetamine, commonly called "crystal" or "crank," which is a very fine white powder Further, the evidence indicated that amphetamine tablets are sold not by weight but by number On the other hand, "crystal," or "crank," is in fact sold by weight but is much more expensive Because of these distinctions, we hold that the classification is reasonable

[18] The second question under our analytical model is the legitimacy of the objectives pursued by the legislation *See Blue Cross*, 779 P 2d at 640 The legislative history of the Stamp Act reveals two objectives, namely, to raise revenue and to discourage illegal drug trafficking [5] Both are legitimate legislative purposes

[19, 20] The third and final question is whether the legislature chose a permissible means to achieve its legitimate ends *Id* at 641 If the relationship of the classification to the statutory objectives is unreasonable, the discrimination is unreasonable *See Malan*, 693 P 2d at 671, *see also Hulbert v State*, 607 P 2d 1217, 1224 (Utah 1980) Here, a heavy tax on controlled substances undeniably will have the effects of raising revenue and inhibiting drug trafficking We cannot say that imposing a drug tax is an unreasonable means of achieving these ends

[21] For these reasons, we reject Zissi's contention that the Stamp Act violates article I, section 24 of the Utah Constitution Because of this holding, we also reject Zissi's contention that the Stamp Act violates the Fourteenth Amendment *See Blue Cross*, 779 P 2d at 645

Third, Zissi contends that compliance with the Stamp Act would require him to provide evidence against himself in violation of the privilege against self incrimination granted in the Fifth Amendment to the federal Constitution and article I, section 12 of the Utah Constitution Zissi argues that the Stamp Act requires self incrimination in two ways first, by requiring a dealer who complies with its terms to provide incriminating information that may be turned over to the state or local prosecutor, and second, by providing vital evidence in a prosecutor's case against a dealer who complies with the Act and affixes the stamps to illicit drugs because such acts show knowledge that the items are controlled substances

[22] As a preliminary matter, we note that Zissi alleges violations of both the state and federal constitutions However, because Zissi failed to argue the issue under the state constitution, mentioning it only offhandedly in his brief, we will not address the state constitutional question *See State v Webb*, 779 P 2d 1108, 1111 n 4 (Utah 1989), *State v Lafferty*, 749 P 2d 1239, 1247 n 5 (Utah 1988)

[23] Turning to the merits of Zissi's federal constitutional argument, we agree that under *Marchetti v United States*, 390 U S 39, 88 S Ct 697, 19 L Ed 2d 889 (1968), *Grosso v United States*, 390 U S 62, 88 S Ct 709 19 L Ed 2d 906 (1968), and their progeny the Stamp Act's provisions violate the federal Constitution because the purchaser would reasonably suppose that compliance would make information available to prosecuting authorities and that the information would provide a 'link in a chain of evidence that would tend to establish the individual's guilt of drug related offenses *See Marchetti*, 390 U S at 48, 88 S Ct at 703

[24, 25] However, although the Stamp Act is facially unconstitutional, we are mindful of our power to save a statute from unconstitutionality by imposing on it a limiting construction This power permits us to uphold an otherwise questionable statute by tailoring it to conform to the Constitution, which is what we must presume the legislature intended *See In re Criminal Investigation*, 754 P 2d 633, 640–41 (Utah 1988), *see also Greaves*, 528 P 2d at 807 The Utah Court of Appeals suggested such a course for the Stamp Act in *State v Davis*, 787 P 2d 517 (Utah Ct App 1990) We follow the course suggested in *Davis*, and we hold that the statute must be read to preclude prosecutors from using *any* information gained as a result of a stamp purchaser's compliance with the tax statute to establish a link in the chain of evidence in a subsequent drug prosecution *See id* at 522–23 With such a reading, the scope of the resulting immunity is broad enough to satisfy the requirements of the Fifth Amendment

[26] Zissi's final challenge to the constitutionality of the Stamp Act is his contention that it violates the Eighth Amendment's prohibition of cruel and unusual punishment because it inflicts an excessive fine or forfeiture The State responds by arguing that the United States Supreme Court has held that the provisions of the Eighth Amendment apply only to criminal fines and forfeitures, not to civil punishments or penalties *See Ingraham v Wright*, 430 U S 651, 664, 97 S Ct 1401 1408–09, 51 L Ed 2d 711 (1977) The State's argument founders on the fact that we have already determined Commission hearings under the Stamp Act to be quasi

5 Senator Ivan Matheson who presented the Stamp Act (S B 209) to the Senate explained the bill as follows

> Mr President this is an interesting concept It's a tax on the sale of illegal drugs Now Minnesota put this particular mechanism on and a year ago picked up $6 million in revenue What it does is [require] the Public Safety Commission [to] prescribe[ ] stamps and seals that must be on those drugs if they're sold If they come in to get the stamps and seals they're illegal to start with and if they don't put them on we can prosecute them for the tax that they didn't pay And we also prosecute them by increasing amounts We can get them for tax evasion on account that they've made money on that they've never reported There's a number of processes set forth in this bill that make it so if you pick anybody up with this drug you've got them one way or another and it's going to lead to some pretty stiff enforcement on it
>
> Like I mentioned Minnesota picked up $6 million I don't have any idea and the fiscal note says they don't on this but it will be a revenue producer It will be a mechanism to tie down these drug pushers and what not and nail them to the wall when they sometimes get away from us The Public Safety Commissioner thinks it's an idea that'll work I don't know how many of you remember back to the time when Al Capone was finally convicted He was convicted on this very process This is a mechanism I think we can reach out and get some of those people If there's any questions I'd be happy to answer

Utah State Senate Record of Third Reading of S B 209 Feb 23 1988 (recording on file with the Utah Senate 47th Leg Senate day 44 disk 91 side 1)

criminal in nature. *See Sims v. Collection Div. of the Utah State Tax Comm'n*, 841 P.2d 6, 14 (Utah 1992). Consequently, we must examine the merits of Zissi's Eighth Amendment claim.

[27] As a threshold matter, we note that because Zissi has cited no authority and made no separate cruel and unusual argument under the state constitution, we will address this issue only in the context of the federal Constitution. This analysis begins with the Supreme Court's opinion in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). In *Solem*, the Supreme Court emphasized that the Eighth Amendment requires that the punishment imposed on a criminal be proportionate to the crime he or she committed. *Id.* at 286–88, 103 S.Ct. at 3007–09. The Court held that to determine the proportionality of the punishment, a court should rely on "objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292, 103 S.Ct. at 3011. *See generally State v. Bishop*, 717 P.2d 261, 269–72 (Utah 1986). Applying these criteria to the case before us, we find that the Stamp Act does not violate the Eighth Amendment.

We begin with the gravity of the offense and the harshness of the penalty. Zissi does not seriously contend that his evasion of the drug tax is a harmless or frivolous offense. Nor could he. Illegal drug trafficking and abuse are significant problems in our society. They create an enormous economic drain on our public funds. We devote substantial resources to educating our citizens against drug abuse and apprehending, convicting, and treating or incarcerating those who violate our drug laws.

The legislature has attempted to recoup some nominal portion of the costs incurred in fighting drug abuse by imposing a tax on the very people—the drug dealers—who benefit so greatly from this usage. Sixty percent of all monies collected under the Stamp Act are distributed "to the law enforcement agency conducting the controlled substance investigation, to be used and applied by the agency in the continued enforcement of controlled substance laws." Utah Code Ann. § 59–19–105(6)(a)(ii). This tax not only provides the state with crucial resources to combat the ills of drug trafficking, but it may have the additional salutary effect of making drug dealing less lucrative, thereby lessening the incentive to purchase and peddle illicit drugs.

By evading the drug tax, Zissi thwarted these legitimate governmental efforts to suppress drug use. This grave offense is in no way disproportionate to the fines the Commission imposed on Zissi under the Stamp Act. A monetary fine is the lightest criminal sanction the state can impose. *See Bishop*, 717 P.2d at 269. Though Zissi argues that the $44,000 penalty greatly exceeded the actual street value of the drug, he makes no attempt to convince us that the penalty is not commensurate with the social and economic harm inflicted on the State of Utah. We hold that under *Solem*, the severity of the sanction imposed on Zissi is not unconstitutionally disproportionate to the gravity of his offense.

Turning to the second element of the *Solem* analysis, we examine the comparability of other penalties imposed for similar offenses. *See Bishop*, 717 P.2d at 270. Utah prescribes heavy penalties for tax evasion. Although the Stamp Act's penalty of 100 percent of the unpaid tax is among the most severe in Utah law, it is by no means unique. For instance, Utah imposes a penalty of 100 percent of underpaid tax when that underpayment is due to fraud with intent to evade the tax. *See* Utah Code Ann. § 59–1–401(3)(d). Consequently, we are unable to say that the Stamp Act's penalties run afoul of the second element of the *Solem* test.

Finally, *Solem* requires us to compare the penalties imposed under the Stamp Act with penalties imposed by similar statutes in other jurisdictions. *See Solem*, 463 U.S. at 292, 103 S.Ct. at 3010. Although we have not undertaken a comprehensive investigation into the drug tax statutes in other states, our research shows that the penalties possible under the Utah Act do not markedly exceed the penalties possible nationwide. In fact, Alabama, Idaho, Kansas, and Minnesota all impose the same taxes on illegal drugs and penalties for evasion of those taxes as does Utah. *See* Ala.Code §§ 40–17A–8, –9(a) (Supp.1991); Idaho Code §§ 63–4203, –4207(1) (Supp. 1992); Kan.Stat.Ann. §§ 79–5202(a), –5208 (1989 & Supp.1991); Minn.Stat.Ann. §§ 297D.08, 297D.09 subd. 1 (1990 & Supp. 1991). Thus, this situation is unlike that in *Solem*, where it appeared that the defendant had been treated more severely than he would have been in any other state. 463 U.S. at 299–300, 103 S.Ct. at 3014–3015. Because Zissi could have received similar penalties in these jurisdictions, we cannot say that the Utah penalty is disproportionate. We reject Zissi's contention that the Stamp Act violates the Eighth Amendment.

Notwithstanding our rejection of all four of Zissi's challenges to the constitutionality of the Stamp Act, our holding that the Stamp Act survives Zissi's constitutional challenges does not dispose of this case. Zissi also attacks the constitutionality of the search of his truck and the seizure of his amphetamine tablets and argues that the exclusionary rule should have prevented the admission of the drugs in evidence at the Commission's hearing. We agree.

[28] We begin with the constitutionality of the roadblock and subsequent search. Before the Commission, both parties briefed the question of the constitutionality of the roadblock stop. The Commission took the position that it had no authority to rule on that question but did so nonetheless, declaring that the roadblock was not unconstitutional and admitting the seized drugs in evidence against Zissi. Before this court, Zissi raised and briefed the issue of the roadblock's constitutionality. The State, in contrast, chose not to address the constitutionality question in its brief, relying instead on the argument that the exclusionary rule should not apply to a tax proceeding. The State's reliance on the exclusionary rule argument implicitly accepted the preliminary assumption that the roadblock was illegal. At oral argument, neither party addressed the legality of the roadblock; both parties assumed that the roadblock was illegal and argued instead only about the application of the exclusionary rule. There is no question that the State had the burden to justify the stop once Zissi challenged its constitutionality. Because it failed to do so, we hold that the State has waived its right to argue the legality of the roadblock stop and accept for the purposes of this appeal that the roadblock stop constituted an unconstitutional seizure that invalidated the subsequent search.

[29, 30] This brings us to Zissi's final contention. He argues that because the roadblock stop was unconstitutional, the evidence resulting from the stop should, under the state exclusionary rule, be excluded from the tax proceeding. Our recent opinion in *Sims v. Collection Division of the Utah State Tax Commission*, 841 P.2d 6 (Utah 1992), governs this issue. In *Sims*, which addressed a similar factual situation, a plurality of this court held that the Utah Constitution's exclusionary rule prevented the Commission from admitting in evidence the drugs taken from Sims' car. *Id.* at 14 (Durham, J., joined by Zimmerman, J.). In a separate opinion, Justice Stewart reached the same conclusion under the federal exclusionary rule. *Id.* at 14 (Stewart, J., concurring in the result). Thus, *Sims* compels us to conclude that the Commission likewise erred in admitting in evidence the amphetamines seized from Zissi's truck. This error was clearly harmful, as the Commission premised the tax and penalties on the drugs themselves. Consequently, we reverse the Commission's decision.

STEWART and DURHAM, JJ., concur.

HOWE, Associate Chief Justice (concurring and dissenting):

I concur in that part of the majority opinion which rejects all four of Zissi's challenges to the constitutionality of the Stamp Act.

I dissent from that part which holds that the roadblock was illegal. I would not reach that issue because it is unnecessary

to do so. I would follow the reasoning of my dissenting opinion in *Sims v. Collection Division of Utah State Tax Commission*, 841 P.2d 6 (Utah 1992), and hold that, assuming the roadblock was illegal and the search of the truck and seizure of the tablets was unconstitutional, the exclusionary rule should not be applied to bar admission of the drugs in evidence before the Commission. My reasoning was that proceedings before the Commission to enforce the Stamp Act are civil in nature and that the exclusionary rule should only be applied in criminal proceedings. Also, I pointed out that imposition of the exclusionary rule would serve no useful purpose because the Commission played no part in either setting up the roadblock or the search and seizure that followed. The police officers have already been punished by the suppression of the seized evidence in Sims' criminal prosecution. The same reasons apply in the instant case.

The majority opinion in *Sims*, in holding that proceedings before the Commission are quasi-criminal in nature, relied heavily on the fact that a 100 percent penalty is imposed by the Stamp Act. In my dissenting opinion, I observed that the penalty was no heavier than is imposed in both federal and civil tax proceedings on erring taxpayers. It is interesting that now, in the instant case, the majority agrees that the penalty is no heavier than is found in our income tax code, which admittedly is a civil, not a quasi-criminal, penalty. States the majority:

> Utah prescribes heavy penalties for [income] tax evasion. Although the Stamp Act's penalty of 100 percent is among the most severe in Utah law, it is by no means unique. For instance, Utah imposes a penalty of 100 percent of underpaid tax when that underpayment is due to fraud with intent to evade the tax. *See* Utah Code Ann. § 59-1-401(3)(d).

The above statement from the majority opinion in this case effectively undercuts one of the chief bases for the majority opinion in *Sims*.

I would affirm the Commission.

HALL, C.J., concurs in the concurring and dissenting opinion of HOWE, Associate C.J.

Duane WILLETT, Plaintiff and Appellant,

v.

Eldon BARNES, Warden, Utah State Prison, Defendant and Appellee.

No. 900344.

Supreme Court of Utah.

Oct. 28, 1992.

Petitioner who pled guilty to charge of first-degree murder sought writ of habeas corpus and leave to withdraw his guilty plea. The Fourth District Court, Utah County, Cullen Y. Christensen, J., denied petitions, and petitioner appealed. The Supreme Court, Durham, J., held that guilty plea court had failed to establish factual basis for petitioner's plea.

Reversed and remanded.

1. Habeas Corpus ⇐475

Petitioner was entitled to habeas corpus relief from plea of guilty to first-degree murder where plea colloquy contained no recitation of any facts surrounding victim's death, and nothing in record indicated that adequate factual basis for conviction existed at time petitioner entered his plea.

2. Habeas Corpus ⇐475

Habeas petitioner's plea of guilty to first-degree murder could not be upheld on basis that petitioner pled guilty pursuant to plea agreement in which prosecution agreed not to seek death penalty against petitioner's son, who allegedly aided petitioner in committing murder in question; although guilty plea may be held valid where record of facts shows that defendant has, for some other legitimate reason, intelligently and voluntarily entered plea, facts must substantiate prosecution of charge at trial, rather than merely establish motivation for entering plea.

3. Criminal Law ⇐273.1(4)

Court cannot be satisfied that guilty plea is knowing and voluntary unless record establishes facts that would place defendant at risk of conviction should matter proceed to trial.

J. Frederic Voros, Jr., Salt Lake City, for Willett.

R. Paul Van Dam, David F. Bryant, Salt Lake City, for Barnes.

DURHAM, Justice:

Plaintiff Duane Willett sought a writ of habeas corpus in the Fourth District Court in Utah County and also sought leave to withdraw his 1983 guilty plea to a charge of first degree murder. After an evidentiary hearing, the district court denied Willett's petitions. This appeal followed. We vacate the district court's ruling and remand for further proceedings.

[1] In 1983, the State charged plaintiff and his son, Harley Willett, with first degree murder. Following plea negotiations, the State agreed to charge Harley Willett with second degree murder in exchange for Duane Willett's guilty plea on a first degree murder charge. Duane Willett now challenges the plea proceeding, contending among other things that the trial court failed to establish a factual basis for the plea. Because we grant plaintiff's requested relief on this ground, we do not address his other claims.

This court's decision in *State v. Breckenridge*, 688 P.2d 440 (Utah 1983), established that before accepting a guilty plea, a trial court must develop a factual basis upon which to base a conviction of the charged crime.[1] *Id.* at 443. In *Breckenridge*, we concluded that even though the plea colloquy did include a recitation of the surrounding facts, as a matter of law those facts were insufficient to support the charge. *Id.* at 442-44. In this case, the colloquy contains no recitation of any facts surrounding the death of the victim. We therefore conclude that the plea colloquy failed to develop the factual basis necessary for the court to properly accept Willett's plea.

On appeal, the State contends, however, as the district court concluded, that the "record as a whole" established a sufficient factual basis to accept the guilty plea, even if the plea hearing did not. Willett's plea occurred before our decision in *State v. Gibbons*, 740 P.2d 1309 (Utah 1987), and the pre-*Gibbons* rule required reviewing courts to uphold guilty pleas as long as the record as a whole demonstrated "substantial compliance" with constitutional and procedural requirements. *State v. Hoff*, 814 P.2d 1119, 1123-24 (Utah 1991).

Applying the substantial compliance test, we conclude that the court below erred. In the entire record, nothing supports a finding that an adequate factual basis existed at the time Willett entered his plea. The State has not adverted to any facts regarding the events themselves that could form the basis of a conviction. The closest anything in the record comes to establishing a factual basis is a brief colloquy, prompted by Mr. Watson, a deputy county attorney, during the entry of Harley Willett's guilty plea on the second degree murder charge:

> MR. WATSON: Perhaps the court would want to inquire whether or not there is a factual basis from this particular defendant with regard to the entry of this plea Your Honor.
>
> THE COURT: Suppose you state for the court briefly Mr. Willett how exactly it happened on the 20th of November?
>
> MR. HARLEY WILLETT: Well, I aided and abetted my father.
>
> THE COURT: In doing what?

1. The rules of practice in effect in the Utah district courts at the time of Willett's plea also required the court to determine "that there is factual basis for the plea." Rules of Practice, Utah District and Circuit Courts, Rule 3.6(c) (now superseded by The Code of Judicial Administration).

Appendix 1

SENATE H.B. 103
46TH LEGISLATURE (DAY 44)
February 26, 1985 (A.M. Session)

• • •

Senator Sandberg — I acknowledged that the bill includes new industry coming into the state as well as expansion of existing in state businesses and I suggest to you that this bill is on the track of encouraging outside business to come into Utah and not giving existing business a fair shake with it. The businesses that now exist in Utah have paid the full load on taxes and you're gonna prevent them to get this break on any expansion which by the minimal or not at all and I view this as showing favoritism to bring outside business in at the expense of existing business.

• • •

Senator Barlow — Mr. Adams, I believe this is really a good bill, but we've had three similar bills. We've had the bill that we've passed in this body that's gone to the house to get tax exemption on air pollution equipment. I understand that bill has been killed by the House. Now that leaves only two bills left. This bill here, which is an industrial development bill, then I understand that House Bill 283 which passed the House practically overwhelmingly which now deals with industries of procurement the rate that we are, that there are over $3 billion of supplies that are ordered or contracted by federal agencies in the State of Utah and if we really got our, the national average, we only get around 4 percent, and the national average is 70, and therefore that bill would pass the legislature to set up appropriation about 1.5 or 6 million. But what I'm wondering is we only have two bills left to consider. This is one and then the other bill which incidently is on our calendar and we just got through taking $7.3 million away from our total appropriations by lowering the mill levy on this school bill. So until we know exactly how much money is available, do you have any suggestions? I understand you are for both remaining bills, is that right?

Dave Adams — Well I can only speak at this time to the bill that's here on the floor. The other matters are, I think, you know you're talking about Representative Holt's bill. I would like to just address this one at this point, if we could. And I am in favor of this particular bill and I do feel that Senator Sandberg has brought up some very good points but I think that all of existing businesses in the state would greatly benefit by having additional

economic development within the state whether it comes out of the state or within the state. And that although new businesses that are originated in Utah or existing businesses that expand, may not have the same benefits, exactly. They would have the benefit on their new equipment, sales tax exemption, plus they'd have the benefit of a stronger economic base in which to compete in and I think that this is a important part of this bill that needs to be understood. I think the existing business people of Utah will greatly benefit from the passage of this particular provision.

• • •